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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

With Tables of the Names of the Cases and Principal Matters.

By EDWARD HYDE EAST, Esq.
OF THE INNER TEMPLE, BARRISTER AT LAW.

Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum. HOR.

VOL. VII.

Containing the Cases of MICHAELMAS, HILARY, EASTER, and TRINITY Terms, in the 46th Year of GEO. III. 1805—1806.

LONDON:

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1815.

B. Bensley,
Bolt Court, Fleet Street.

JUDGES

OF THE

COURT OF KING's BENCH,

During the Period of these REPORTS.

EDWARD Lord ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SOULDEN LAWRENCE, Knt.
Sir SIMON LE BLANC, Knt.

ATTORNIES-GENERAL.

The Honorable SPENCER PERCEVAL.
Sir ARTHUR PIGGOTT, Knt.

SOLICITORS-GENERAL.

Sir VICARY GIBBS, Knt.
Sir SAMUEL ROMILLY, Knt.

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CASES

C A S E S

ARGUED AND DETERMINED

IN THE

1805.

COURT OF KING'S BENCH,

IN

Michaelmas Term,

In the Forty-sixth Year of the Reign of GEORGE III.

LANE *against* COBHAM and two Others.

Friday, Nov. 8th.

IN trespass for taking and converting the Plaintiff's goods, to which the general issue was pleaded, it appeared that the action was brought to try the validity of a poor rate against the two justices who granted the warrant of distress under which the plaintiff's goods were taken, and one of the parish officers of *Wokingham* in the counties of *Wilts* and *Berks*, who procured and executed such warrant: and the question was, whether the rate in dispute, made by four overseers appointed for the whole parish, were good; or whether there ought not to have been three several rates for so many distinct divisions of the parish made by separate respective overseers of the poor of each division? At the trial before *Graham* B. at the last assizes for *Salisbury* it was proved, that from all antecedent time down to the year 1773 the parish at large of *Wokingham* had been in fact divided into three districts, each of which had maintained their own poor separately; one consisting of the corporate town of *Wokingham*, which lay for the most part in the county of *Berks*, with a small part in the

Though a parish had at no time antecedent to the years 1773-5 had the benefit of the stat. 43 *Eliz. c.* 2. but had always had five overseers of the poor appointed separately, two for one district, two for another, and one for a third; yet two of the districts having agreed in 1773 to act together, to which the third acceded in 1775, and there having been but four overseers since that period who had been appointed for the *whole* parish, the Court held that such agreement at the time, acted upon for 30 years past, was proper evidence for the jury to decide that the parish could in fact enjoy the benefit of the stat. 43 *Eliz.*: and consequently that a distress levied for a poor rate made by the overseers conjointly appointed for the whole parish was legal.

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LANE *against* COBHAM.

county of *Wilts;* the second consisting of the remaining part of the parish, which lay in the county of *Berks;* the third called the *Wiltshire* liberty lying in *Wilts:* (*a*) that during that time there had always been separate overseers of the poor for each part, two for the town, and two for the *Berkshire* part of *Wokingham,* and one for *Wilts;* separate rates, and separate constables appointed; and there had been removals of paupers and certificates granted from each of the several parts to the others. That in the year 1773 the town of *Wokingham* and the *Berkshire* district agreed to unite, and invited the *Wilts* district to accede to the union, and that the latter came into the agreement in 1775; and that, for the purpose of sanctioning as far as might be such union, a mandamus was applied for to the Court of King's Bench, commanding two justices of the peace to appoint four overseers for the whole parish, to which no opposition or return was made; and that from that period down to the present time, there had always been four overseers and no more appointed for the whole parish, who had made one rate accordingly, and had in all respects conformed themselves to the stat. 43 *Eliz. c.* 2. The learned Judge was therefore of

[3] opinion at the trial, that it was competent to the inhabitants of the parish in the years 1773 and 1775 to come to the agreement which they did, (laying no stress on the mandamus, which he thought arose out of that agreement,) such agreement being in conformity to the general provisions of the stat. 43 *Eliz.* for the management of the poor, from which the parish had deviated without authority from that period to the passing of the act of the 13 & 14 *Car.* 2. *c.* 12. *s.* 21. which first sanctioned such a deviation; but that they were not bound to continue under the direction of the latter statute, if in point of fact the parish could avail itself of the provisions of the general antecedent law; the statute 13 & 14 *Car.* 2. only applying to such parishes as *have not* and *cannot* reap the benefit of the stat. 43 *Eliz.;* and that in the present case he thought that the uninterrupted usage for the last 30 years went to shew that the parish could have, because they had in fact had, the benefit of the stat. 43 *Eliz.;* on which ground he directed the jury to find a verdict for the Defendants. The jury accordingly found for the defendants under that direction, but found also as a fact

(*a*) The parish was proved at the trial to be five miles long, three broad, and 18 in circumference.

that

1805.

LANE *against* COBHAM.

that prior to the agreement in 1773-5 the three districts had always maintained their poor separately under separate overseers. And the plaintiffs had liberty to move the Court to set aside the verdict, and grant a new trial, if the direction given to the jury were wrong in point of law. Accordingly,

Lens Serjt. and *East* now applied for a rule for that purpose; contending that the agreement in 1773-5 on the part of the parishioners to have but four overseers, and to maintain their poor altogether was not binding where it appeared that from all time antecedent the parish had not had the benefit of the stat. 43 *Eliz.* but had been regulated by the provisions of the [4] stat. 13 & 14 *Car.* 2. from the time when their ancient usage received the sanction of that act, which thenceforth became the law of the parish; and that the modern usage of the last 30 years originating by agreement, could not alter the prior law and custom of the parish; but that the question must be considered now in the same manner as it would have been at the time when the agreement was made, and was so stated by the learned Judge to the jury: and that it was competent now, as it would have been then, for any of the parishioners to revert to the ancient law and custom of the parish to maintain its poor in separate districts. That the words of the stat. 13 & 14 *Car.* 2. applying to the parishes which *had not* nor *could* reap the benefit of the stat. 43 *Eliz.* could not be understood to mean a physical impossibility of managing the poor by four overseers, but that they could not properly do so without more; and that was evidenced in this case by the long antecedent usage grown into the law of the parish at the time when the agreement in question was entered into, and by the fact proved at the trial that two overseers were still chosen *alternately* for the town of *Wokingham*, and the *Berkshire* part of the parish, and one for each of the others, though the four when chosen were appointed for the whole parish. And that if the regulations of the statute of *Car.* 2. once adopted could be departed from, it would open a door to continual disputes and inconvenience.

The Court however, were clearly of opinion, that the question was proper to be left to the jury, and that it was in their province to decide whether the parish under these circumstances could have the benefit of the stat. 43 *Eliz.*; and there was no evidence to shew that they could not, opposed to the weight of [5] a usage for 30 years past to shew that they might have, and

1805.

LANE *against* COBHAM.

actually had enjoyed the benefit of it. That the agreement in 1773-5 shewed, that in the opinion of the parishioners of that period they might have the benefit of that statute, and it now appeared that in point of fact they have acted under it ever since. There therefore seemed to be no reason for disturbing the practice which had prevailed for so long time, or for scrutinizing every part of the direction, when the learned Judge's opinion and the verdict of the jury were substantially right.

Rule refused.

Monday, Nov. 11th.

M'COMBIE *against* DAVIES.

Where a broker *pledges* the goods of his principal as his own, the pawnee who claims by such *tortious* act of the broker cannot claim to retain against the principal in trover for the amount of the lien which the broker had on the goods for his general balance at the time of such pledge. It may be otherwise where one who has a lien delivers the goods to a third person as a security, with notice of his lien, and appoints him to continue his possession as his servant for the preservation of his lien.

THIS action of trover for tobacco having gone to a second trial, in consequence of the opinion of the Court delivered in *Trinity* term last, (*a*) when it was considered that the Defendant's taking an assignment of the tobacco in the King's warehouse by way of pledge from one *Coddan*, a broker, who had purchased it there in his own name *for his principal*, the Plaintiff, (after which assignment the tobacco stood in the defendant's name in the warehouse, and could only be taken out by his authority,) and the defendant's refusing to deliver it to the plaintiff after notice and demand by him, amounted to a conversion. The defence set up at the second trial was, that the plaintiff being indebted to *Coddan* his broker in 30*l.* on the balance of his account; and he having a lien upon the tobacco to that amount while it continued in his name and possession, the defendant who claimed by * assignment from *Coddan* for a valuable consideration stood in his place and was entitled to retain the tobacco for that sum; and therefore that the plaintiff not having tendered the 30*l.* ought to be nonsuited. Lord *Ellenborough*, C. J., however, being of opinion that the lien was personal, and could not be transferred by the *tortious* act of the broker pledging the goods of his principal, the plaintiff recovered a verdict for the value of the tobacco.

The Solicitor-General now moved to set aside the verdict, and either to enter a nonsuit or have a new trial; upon the ground

(*a*) 6 *East*, 533.

that

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M'COMBIE *against* DAVIES.

that the defendant who stood in the place of *Coddan*, and was entitled to avail himself of all the rights which *Coddan* had against his principal, could not have the goods taken out of his hands by the principal without receiving the amount of *Coddan*'s claim upon them. And in anwer to the case of *Daubigny* v. *Duval*, (*a*) (which was suggested as establishing a contrary doctrine) he observed that Lord *Kenyon* was of opinion at the trial, that the principal could not recover his goods from the pawnee, to whom they had been pledged by the factor, without tendering to the pawnee the sum advanced by him, which was within the amount of the factor's lien upon the goods for his general balance; and that his lordship seemed to retain that opinion when the case was moved in court, though the rest of the Bench differed from him. But

Lord ELLENBOROUGH, C. J. said, that nothing could be clearer than that liens were personal, and could not be transferred to third persons by any *tortious* pledge of the principal's goods. That whether or not a lien might follow goods in the hands of a third person to whom it was delivered over by the party having the lien, purporting to transfer his right of lien to the other, as his servant, and in his name, and as a continuance in effect of his own possession; yet it was quite clear that a lien could not be transferred by the *tortious* act of a broker *pledging* the goods of his principal, which he had no authority to do. That in *Daubigny* v. *Duval*, though Lord *Kenyon* was at first of opinion that there ought to have been a tender to the pawnee of the sum for which the goods had been pledged by the factor, within the extent of his lien, in order to entitle the plaintiff to recover; yet after the rest of the court had expressed a different opinion, on which he at that time only stated his doubts, he appears in a subsequent case of *Sweet and another, Assignees of Gard* v. *Pym*, (*b*) to have fully acceded to their opinion; for he here states that "the right of lien has never been carried further than while the goods continue in the possession of the party claiming it." And afterwards he says, "In the case of *Kinloch* v. *Craig*, (*c*) where I had the misfortune to differ from my brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession: but the contrary

[7]

(*a*) 5 *Term Rep.* 604. (*b*) 1 *East*, 4.
(*c*) 3 *Term Rep.* 119. afterwards in *Dom. Proc.* ib. 786.

was

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M'COMBIE *against* DAVIES.

was ruled by this court, and afterwards in the House of Lords."

His Lordship then, after consulting with the other Judges, declared that the rest of the Court coincided with him in opinion, that no lien was transferred by the pledge of the broker in this case: and added, that he would have it fully understood that his observations were applied to a *tortious* transfer of the goods of the principal by the broker undertaking to *pledge* them *as his own;* and not to the case of one who intending to give a security to another to the extent of his lien, delivers over the actual possession of goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him; in which case he might preserve the lien.

[8]

Per Curiam, Rule refused.

Tuesday, Nov. 12th.

DOE on the Demise of LEVISON VERNON, *against* HENRY VERNON and Others.

The devisee of a copyhold or customary estate which had been surrendered to the use of the will, having died before admittance, her devisee though afterwards admitted, cannot recover in ejectment; for his admittance has no relation to the last legal surrender: but the legal title remains in the heir of the surrenderor. Though if the first devisee had been considered to be admitted in construction of law, (the devise to her being in remainder after a devise to one who was customary heir of the surrenderor, and who paid rent to the lord for several years, but though required to come in and be admitted, had never done so,) or if the admittance of the first devisee's heir could be considered as an admittance by relation back of the first devisee herself; yet she not having surrendered to the use of her will, her devisee could not take the legal estate. But whether the heir of the surrenderor would be considered as a trustee for the second devisee, a court of equity is alone competent to decide.

IN ejectment for certain customary tenements in the parish of *Wakefield* and county of *York*, tried in the Spring of 1805, before *Graham* B., a verdict was taken for the Plaintiff, subject to the opinion of the Court on the following case.

Thomas Earl of *Strafford*, being seised to him and his heirs, according to the custom of the manor, of (amongst others) the tenements mentioned in the declaration, which are customary tenements holden of the manor of *Wakefield*, *by copy of court roll*, by rents and services *according to the custom of the manor*, and pass *by surrender and admittance*, paying on admittance thereto; some of them compounded or with certain fines, and others of them uncompounded, or with arbitrary fines to the lord;

on

1805.

DOE dem. VERNON *against* VERNON.

on the 10th of *April* 1732, according to the custom of the manor, made the following surrender of his customary tenements to the use of his will: "*Wakefield*, &c. At this court "it was witnessed upon the oaths of *B. S.*, a tenant of * the "lord, that the Right Hon. *Thomas* Earl of *Strafford*, the 10th "of *April* 1732, did surrender into the hands of the lord of "the said manor by his hands all and singular the messuages, "&c. lands, tenements, and hereditaments whatsoever, with "their appurtenances, situate in *Wakefield*, *Stanley*, *Alverthorpe*, "*Thornes*, and *Sandal-Magna*, or elsewhere within the said "manor of *Wakefield*, which the said Earl now holds of the "lord of the said manor of *Wakefield*, by copy of court roll, "in whose tenures or occupations soever the same now are; "being of the yearly rent to the lord in the whole of 4*l.* 10*s.* 8½*d.*, "*and compounded for:* (*a*) to and for such uses, &c. and "upon such trust, &c. and under such powers and authorities, "as are or shall be declared by the last will in writing of him "the said Earl, and to and for none other use, intent, or pur- "pose whatsoever." The whole of the lord's rents paid for the customary tenements of the Earl holden of the manor amounted at the time of the said surrender to 4*l.* 18*s.* 1½*d.* part thereof, to wit, 2*l.* 11*s.* 5*d.* being for the *compounded*, and 2*l.* 6*s.* 8½*d.*, the residue thereof, being for the *uncompounded* part of the customary tenements. The Earl, on the 22d of *June* 1732, by his will of that date duly executed, after specifically devising several estates to be held in tail, made the following general residuary devise of his other estates, including the said customary tenements holden of the manor of *Wakefield* which he had so surrendered to the use of his will: "And as to all "other my manors, messuages, lands, tenements, and here- "ditaments, whatsoever and wheresoever, either *freehold* or "*copyhold*, (except those in the said counties of *York*, *Lincoln*, "and *Nottingham*, which I have already disposed of by my "will as aforesaid,) subject to the said several rents-charges of "2000*l.* and 200*l.* per annum, and such devises thereof as "aforesaid, and the legacies by this my will, or by any codicil "which I shall hereafter make, I give and bequeath the same *in* "*failure of issue male of the body of my said son* William *Lord* "Wentworth, *and of my own body*, to my said three daughters, "Lady *Ann*, Lady *Lucy*, and Lady *Harriet*, and their heirs,

Vernon [9]

[10]

(*a*) Vide *Roe d. Conolly* v. *Vernon*, 5 *East*, 51.

"equally

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DOE dem. VERNON *against* VERNON.

" equally to be divided between them, as tenants in common, " and not as joint tenants." The said testator died in *Nov.* 1739, without altering or revoking his said will, and leaving his only son, the said *William* Earl of *Strafford*, and his said three daughters him surviving. *William* Earl of *Strafford*, on the death of his father Earl *Thomas*, entered into the said customary tenements, and enjoyed the same till his death, without issue, in 1791; *but was never admitted thereto.* Lady *Harriet Vernon*, one of the said daughters of Earl *Thomas*, on the 20th of *April* 1779, and whilst she was a widow, by her will of that date duly executed devised as follows: " Whereas under or by virtue " of the last will and testament of my late father the Earl of " *Strafford* deceased, I am or shall be entitled, upon the con- " tingencies therein mentioned, to the *fee simple* of and in one " undivided third or some other part or share of divers manors, " messuages, lands, tenements, and hereditaments in the seve- " ral counties of *York*, *Lincoln*, *Nottingham*, *Northampton*, " *Bedford*, *Suffolk*, and *Middlesex*, or elsewhere; now I do " hereby give and devise all my estate, right, title, share, " and interest of, in, and to the said several manors, mes- " suages, lands, &c. of what nature or kind soever, and " wheresoever situate or being, unto and to the use of my son " *Levison Vernon*, his heirs and assigns for ever: but subject [11] " nevertheless, and I do hereby charge the same estates with " the payment of 2500*l.* from and immediately after my said " son *Levison Vernon*, his heirs and assigns, shall come into pos- " session thereof: such sum of 2500*l.* to be paid as therein " directed." And after bequeathing several specific legacies, she devised as follows: " And all the rest, residue, and re- " mainder of my estates, real and personal, of what nature or " kind soever, goods, chattels, and effects, I give, devise, and " bequeath to my son *Levison Vernon*, his heirs, executors, and " administrators." Lady *Harriet* afterwards on the 15th of *July*, by her codicil of that date duly executed, devised as follows: " Whereas since the making of the foregoing will I am " become seised of or entitled to sundry manors, messuages, " lands, tenements, and hereditaments in the counties of *North-* " *ampton* and *Bucks*, devised to me by *Elizabeth Tordiffe*, widow " lately deceased; I do hereby give and devise all and singular " the said estates, and all my right, title, and interest therein " and thereto, unto and to the use of my son *Levison Vernon*, " his heirs and assigns for ever; charged and chargeable never- " theless

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" theless with the payment of several annuities as therein men-
" tioned. And I do hereby confirm my foregoing will in all
" respects, and declare this to be a codicil thereto." Lady *Harriet never surrendered* the said customary tenements *to the use of her will;* nor was *she* or any other person (except as after mentioned) ever *admitted* to the same subsequent to the death of Earl *Thomas.* Lady *Harriet* died in 1786, without altering or revoking her said will or codicil, leaving two sons her surviving, viz. *Henry Vernon* the defendant, her eldest son, and *Levison Vernon,* the lessor of the plaintiff and devisee named in her will, her youngest son. On the death of *William* Earl of *Strafford,* son of Earl *Thomas,* considerable freehold estates in the counties [12] of *Northampton, Suffolk, Middlesex,* and *Kent,* came into the possession of the descendants of the aforesaid three daughters of Earl *Thomas,* on failure of his and his son's issue male, by virtue of the aforesaid residuary devise in his will. And the lessor of the plaintiff, *Levison Vernon,* by virtue of the will of his mother, Lady *Harriet,* became entitled to one-third part thereof, and has ever since enjoyed the same; but Lady *Harriet* was not at the time of making her will, or at the time of her death, seised of or entitled under or by virtue of the will of her father, *Thomas* Earl of *Strafford,* to any devisable estate or interest of or in any *freehold* premises, or any other premises, in the county of *York,* other than such estate or interest as she was entitled to (if any) in the aforesaid customary tenements under and by virtue of the aforesaid residuary devise of *Thomas* Earl of *Strafford.* The defendant *Henry Vernon,* son of Lady *Harriet,* is customary heir of the tenements in question, which are in the nature of compounded and uncompounded customary tenements, and part of the said customary tenements holden as aforesaid of the manor of *Wakefield,* whereof Earl *Thomas* was seised as aforesaid at the time of making the said surrender and at his death. It has been usual within the said manor for persons entitled to reversionary interests in customary lands holden of the manor, and desirous to dispose thereof by will or in mortgage or otherwise, to be admitted to such reversionary interests; and upon such admittances to estates not in possession, for the steward to assess an half fine; and such persons when so admitted have surrendered the same to the uses of their wills; and upon the inrolments of such surrenders for no fine to be paid: and no instance has been found of any admittance of persons

claiming

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claiming under wills, without a previous surrender to the use of such wills. The lessor of the plaintiff has been admitted to the tenements in question, and so has the defendant *Henry Vernon*, who is in possession thereof as landlord; and the other defendants are his tenants. The question was, whether the lessor of the plaintiff were entitled to recover all, or any part, and which, of such customary tenements? And it was agreed that this special case should be turned into a special verdict at the request of either party, or of the Court.

The case appearing to the Court upon the first argument to have been defectively stated, the following facts were afterwards added.

A sum of 4*l.* 14*s.* 6*d.* was annually paid by *William* Earl of *Strafford*, as customary or lord's rent, for these customary lands holden of the manor of *Wakefield*, from the death of his father Earl *Thomas*, until the same was discontinued as hereinafter mentioned. The amount of such rents in the lord's books is 4*l.* 18*s.* 1½*d.*, but Earl *William* never paid more than the above sum of 4*l.* 14*s.* 6*d.* The receipts of the customary or lord's rents are entered in a book distinct from the court rolls, and never appear upon the rolls. Earl *William* does not appear by the court rolls to have been ever admitted, but was frequently applied to by the lord and by his steward to come in and be admitted, which he did not do: but in the year 1779 the lord insisting upon the said Earl *William*'s coming in to be admitted, and to pay his fines, the payment of the above sum of 4*l.* 14*s.* 6*d.* was discontinued; and in 1791 the lord filed his bill in Chancery against *Frederick Thomas* Earl of *Strafford*, to whom the estate had then descended, and the customary heirs of *William* Earl of *Strafford*, to compel the party entitled to
[14] the lands to come in and be admitted thereto, and that the lord's fine should be paid; which suit is still depending. The surrender of Earl *Thomas* to the uses of his will was presented in court in 1741, after his death, according to the custom of the manor; but his will was never enrolled until the year 1802, when Mr. *Conolly* was admitted tenant to the compounded part of the customary tenements under a writ of mandamus.

T. Carr in the last term (*a*) premised his argument by stating the principal facts to be shortly these; that Earl *Thomas* having

(*a*) This was before the additional facts above stated were made part of the case.

surrendered

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surrendered the premises of which he was seised to him and his heirs, to the use of his will, died in 1739, leaving his only son Earl *William*, and three daughters, of whom Lady *Harriet Vernon* was one, after having demised the premises on failure of issue male of himself and his son to his three daughters and their heirs. That Lady *Harriet* made her will in 1779, and died in 1786; and that Earl *William*, her brother, survived her, and died without issue in 1791, never having been admitted. He then contended that the customary estates in question passed to the lessor of the plaintiff, the younger son and devisee under the will of Lady *Harriet*, upon the following grounds: 1st, That the legal estate in a customary or copyhold tenement surrendered to the use of a will remains in the surrenderor, and on his death descends to his heir, until an admittance of some person having relation to that surrender. For which he cited *Doe* d. *Shewen* v. *Wroot*, (*a*) and *Co. Cop. s.* 39. there cited as in point. 2dly, That the interest taken by the party named as devisee in the will made upon such surrender is until admittance an *equitable* interest only; and that such was the interest which Lady *Harriet* had as devisee in remainder under the surrender to the use of Earl *Thomas*'s will; Earl *William* never having been admitted; which, if he had been admitted under the will as *devisee*, and not *as heir*, might have been contended to be an admittance of those in remainder, upon the supposition that he was the first taker. This, he said, followed as a consequence from the first proposition, and was further established by the case of *Roe* d. *Jeffereys* v. *Hicks*; (*b*) where one had surrendered a copyhold to the use of his will, and devised the same; and the devisee before admittance was convicted of felony and executed; and it was holden that the lands descended to the heir of the surrenderor; the devisee having before admittance no interest in them as tenant which she could forfeit to the lord. 3dly, That Lady *Harriet* might devise such her equitable interest to the lessor of the plaintiff, without any surrender of it to the use of her will; according to *Davy* v. *Beardsham*, (*c*) *King* v. *King*, (*d*) *Greenhill* v. *Greenhill*. (*e*) [*Le*

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(*a*) 5 *East*, 132. (*b*) 2 *Wils* 13. 16.

(*c*) 1 *Chan. Cas.* 39. 3 *Chan. Rep.* 4. and 2. *Freem.* 157.

(*d*) 3 *P. Wms.* 358.

(*e*) 2 *Vern.* 679. *Prec. in Chan.* 320. *Gilb. Eq. Cas.* 77. And vide *Carr* v. *Ellison*, 3 *Atk.* 75.

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Blanc J. said, that it was too plain a proposition to be denied that an *equitable* interest in a copyhold would pass by devise, without a surrender to the use of the will.] Then 4thly, he contended, that the lessor of the plaintiff, the devisee of such equitable interest, having been admitted, such his admission had relation to the surrender made by Earl *Thomas*, the first devisor, to the use of his will, and vested the legal interest in him, the
[16] lessor: allowing that an admittance without title would not give a title. As in *Holder* d. *Sulyard* v. *Preston*, (*a*) where one surrendered to the use of his will, and by his will directed the copyhold to be sold by trustees, and the money to be applied to certain uses; it was holden that a purchaser was entitled to be admitted under a conveyance from the trustees, without any previous admission of the trustees or of the heir at law of the surrenderor. So the admittance of the heir of a surrenderee dying before admittance has relation to the surrender, so far even as to give the surrenderee's widow her free bench. *Vaughan* d. *Atkins* v. *Atkins*, (*b*) which contains the whole law on the subject. And in *Kenebel* v. *Scrafton*, (*c*) the copyhold having been surrendered to one *Atkins* by way of mortgage, who after devising to *S.* and others died without being admitted; and then the mortgager having died, and the copyhold descending to his infant daughter and heir at law, the Master, to whom the matter was referred, certified to the Lord Chancellor that the legal estate remained in the mortgagor, but that the devisees of the mortgagee were entitled to be admitted: and his Lordship, in *March* 1805, directed the same accordingly. He then argued, 5thly, that the customary estates in question passed to the lessor of the plaintiff under the devise in Lady *Harriet's* will of "all her estate, right, title, share, and interest in the several manors, lands, tenements, &c., of what nature or kind soever," &c. "in the counties of *York*," &c. Besides which there is a general clause, giving him "all the rest, residue, and remainder of her estates real and personal, of what nature or kind
[17] soever." He said, that it had been a question in some cases whether *copyhold* would pass by general words; but that was where there had been no surrender to the use of the will, and the doubt was whether the Court of Chancery would supply

(*a*) 2 *Wils.* 400. (*b*) 5 *Burr.* 2764. 2773. 2787.

(*c*) This was quoted from MS. The same case, upon other points, is reported in 5 *Ves. jun.* 663. 8 *Ves. jun.* 39. and 2 *East*, 530.

one:

one: but here no surrender is wanted; and in *Car.* v. *Ellison* (*a*) the words, "*all my real estate*" were deemed sufficient to pass an equitable in a copyhold.

Walton, for the defendant, after referring to the case of *Roe* d. *Conolly* v. *Vernon* (*b*) as having decided that the *compounded* customary tenements only were surrendered to the use of Earl *Thomas*'s will, observed generally upon the two first points made in argument for the plaintiff, that the legal interest in a copyhold can pass no otherwise than by *surrender* and a will only operates as a declaration of the use created by the surrender, and not as a devise of the land itself; and therefore it is that, according to *Tufnell* v. *Page*, (*c*) neither the statutes of wills (*d*) affect copyholds, nor the statute of frauds, (*e*) so far as the attestation of three witnesses to a will of land is required; though as a declaration of a use it is thereby required to be in writing. As there must be a surrender, so there must be an admittance in pursuance of such surrender; for before admittance a surrenderee has no interest in the copyhold: if he enter he is a trespasser, and if he surrender to another it is merely void. *Co. Copyh.* *s.* 39. and *Supplement*, *s.* 4. So if he commit waste, or felony, it is no forfeiture, because not being legal tenant he has nothing to forfeit. On that ground the case of Miss *Jefferys* (*f*) was decided: the Court said, that as devisee of a copyhold surrendered to the use of a will she had before admittance neither *jus* [18] *in re* nor *ad rem*, which as understood in the civil law, from whence the expression is borrowed, means that the party has neither a right of possession nor a right of action. Lord *Coke* in his *Copyholder* likens a surrenderee before admittance to a feoffee without livery: the investiture is not complete: the legal title remains in the feoffor in the one case, and in the surrenderor in the other, and upon the death of either it descends to his heir. 3dly, Admitting that according to decided cases an equity in a copyhold may be devised without a surrender to the use of the will, yet this court cannot take notice of the devise of an equity; they can only look to the legal title. And though the Court of Chancery will in general consider the heir at law as a trustee for the devisee of an equitable interest in a copyhold, where the intent of the testator to pass it is plain; yet that does not hold

(*a*) 3 *Atk.* 73. (*b*) 5 *East*, 51. (*c*) 2 *Atk.* 37.
(*d*) 32 *H.* 8. *c.* 1. and 34 & 35 *H.* 8. *c.* 5. (*e*) 29 *Car.* 2. *c.* 3.
(*f*) 2 *Wils.* 15—16.

universally;

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universally; for relief was denied in the case cited of *Davy* v. *Beardsham*; (*a*) and whenever it is given, that court may do it upon equitable terms: but this is an attempt to accomplish at once what the Lord Chancellor might refuse altogether, or only give effect to under circumstances. And this is a dispute between the heir at law having the legal estate, and the devisee a younger brother, who is otherwise well provided for, a circumstance to which the Lord Chancellor would advert. (*b*) 4thly, As to the admission of Lady *Harriet*'s devisee having relation to the surrender to the use of Earl *Thomas*'s will, the whole doctrine upon this subject was much considered in *Vaughan* v. *Atkins*, (*c*)

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and there it was holden, that if the admittance were *pursuant to the surrender*, it would relate back to it, and altogether make but one conveyance: and therefore by the admittance of the heir of the surrenderee, his widow became entitled to her free bench; the legal estate thereby vesting by relation in the surrenderee himself, as if he had been admitted in his lifetime: as on the other hand, in *Benson* v. *Scot*, (*d*) where the surrenderee was not admitted till after the death of the surrenderor, yet by the relation of such admittance to the surrender, the estate was considered as out of the surrenderor before his death, so as to oust his widow of her free bench, and to avoid all mesne acts of the surrenderor. Then if the admittance of the defendant, the heir at law of Lady *Harriet*, be the same by relation as the admittance of Lady *Harriet* the devisee herself; (and as a remainder or reversion may be surrendered, so one having such an interest may be admitted) then her devise of the customary tenements in question would be void for want of a surrender to the use of her will. And the same objection would apply if the payment of the customary rent by Earl *William* (*e*) could under the circumstances stated be considered as an admittance of him as first taker under the will of Earl *Thomas*, and so an admittance of those in remainder; though another question might arise, whether the remainder to the daughters in the will of Earl *Thomas*, after an indefinite failure of issue male of his son Earl *William*,

(*a*) 1 *Chan. Cas.* 39. 3 *Chan. Rep.* 4. and 2 *Freem.* 157.

(*b*) Vide *Ross* v. *Ross* 1 *Eq. Cas. Abr.* 124.

(*c*) 5 *Burr.* 2764. 2735.

(*d*) 3 *Lev.* 385. and 1 *Salk.* 155.

(*e*) This fact was stated to exist on the first argument, though it was not regularly added to the case till afterwards.

were

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were not too remote. But if the doctrine be clear, as laid down in *Vaughan* v. *Atkins*, (*a*) and in *Co. Copyh. s.* 41. that the title to estate * of this nature passes only by the surrender, and that an admittance in itself confers no title, except as it has relation to the surrender, it follows that the lord's act in admitting the lessor of the plaintiff is void; for he is not the *heir* of Lady *Harriet;* and the will of Earl *Thomas* having declared the uses of his surrender to be to Lady *Harriet* and her sisters and their *heirs*, none other than one who claimed as heir to one of them could be admitted. There is not even the word *assigns* in the will of Earl *Thomas*, which might apply to an alienee, such as the lessor of the plaintiff is; though even that would not have done when coupled with the word *heirs*. It will be in vain hereafter to refer to the rolls of the court, to ascertain in whom the title is, if a will, and that too without a surrender to the use of it, may pass the title out of court. And if equity will take notice of an alienation by will, why should it not equally notice an alienation by deed? As to the 5th point, he denied that the customary estates in question passed to the lessor of the plaintiff by the will of Lady *Harriet*. The general rule is, that neither copyholds nor leaseholds pass by the general words of a will, unless the copyholds have been surrendered to the use of the will, which was not done here; or unless there are particular circumstances to shew an intent to pass them. And in Chancery, where the question most frequently occurs as to copyhold, the Lord Chancellor will not supply a surrender without an apparent intent of the devisor to pass copyhold. *Ross* v. *Ross*, (*b*) *Bullock* v. *Bullock*, (*c*) *Challis* v. *Casborn*, (*d*) *Byas* v. *Byas*, (*e*) *Hawkins* v. *Leigh*, (*f*) *Milbourn* v. *Milbourn*, (*g*) and *Hindoop* v. *Eboral*, (*h*) shew that the only exceptions to the general rule are either where the devisor had no other than copyhold lands, or where the devise is in favour of a wife, child, or creditors, not otherwise or inadequately provided for; and put even in favour of a wife or younger children, as against the heir left unprovided for. It is true that Lady *Harriet* had no freehold in *Yorkshire*, which is named amongst other counties, but she had

* [20]

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(*a*) 3 *Barr.* 2704. 2785. (*b*) *Eq. Cas. Abr.* 124.
(*c*) 2 *Eq. Cas. Abr.* 231. and *Vin. Ab.* 58. *pl.* 19.
(*d*) *Prec. in Chan.* 408. (*e*) 2 *Ves.* 164. (*f*) 1 *Atk.* 387.
(*g*) 2 *Bro. Ch. Rep.* 61. (*h*) 3 *Bro. Ch. Rep.* 188.

in

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in other counties named: and the mention of *Yorkshire* is not conclusive that she intended to pass her customary estates there; for she also names *Lincolnshire* and *Nottinghamshire*, in which she had nothing. It is plain therefore that she had no particular estates in contemplation, and she prefaces the whole list of counties with reciting that she was entitled under the will of her father to *the fee simple* of one undivided third part of lands, &c. in the several counties named; which shews that, if any, her *freehold* lands only were particularly in her contemplation. A similar rule has been applied to leaseholds in *Rose* v. *Bartlett*, (*a*) confirmed by *Thompson* v. *Lawley*, (*b*) and particularly in *Davis* v. *Gibbs*. (*c*)

Lord ELLENBOROUGH, C. J. on the first argument desired that the case might either be amended or go down to another trial, in order to have the fact more regularly brought before them, which had been suggested, namely, that for many years Earl *William* had paid rent to the lord which had been accepted, which
[22] would afford ground to presume an admittance of him as tenant. And then it might be argued, that the admittance of the particular tenant was the admittance of those in remainder. Though he suggested that the difficulty would still occur to the lessor of the plaintiff in either way of considering the case; for if there were no admittance of Lady *Harriet*, her devisee could not claim to be admitted under the surrender to the use of Earl *Thomas*'s will; and if she were admitted, then she could not devise without having surrendered to the use of her will.

In this term *Watkins* argued for the plaintiff, and began by stating two questions; 1st. Whether Lady *Harriet Vernon* was possessed of such an interest in the customary estates as she could devise, without a surrender to the use of her will? 2dly, Whether if she had such a devisable interest, she had used proper words in her will to pass it? Upon the first point he was proceeding to shew that Lady *Harriet*, never having been admitted, had only an equitable title, which was consequently devisable without a surrender to the use of her will, inasmuch as an equitable interest cannot be surrendered; and that on the death of

(*a*) *Cro. Car.* 293. But where the leasehold had always been let with the freehold as one farm, it was holden to pass under general words. *Lane* v. *Ld. Stanhope*, 6 *Term Rep.* 345.

(*b*) 2 *Bos. & Pull.* 312. (*c*) 3 *P. Wms.* 26.

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Earl *Thomas* the legal estate descended to his customary heir Earl *William*, and so to the next heir, till the admittance of the lessor of the plaintiff, which entitles him to maintain this ejectment. And in addition to the authorities before cited on this point, he mentioned 1 *Roll. Abr.* 502. *pl.* 3. 4. *Doe* v. *Miller*, (*a*) *Berry* v. *Green*, (*b*) *Peachy* v. *The Duke of Somerset*, (*c*) *Semaine's* case, (*d*) *Allen* v. *Poulton*, (*e*) *Attorney-General* v. *Andrews*, (*f*) and *Duke of Marlborough* v. *Lord Godolphin*. (*g*) He also referred to *Hills* v. *Downton*, (*h*) to shew that the Court would not look to the circumstance, whether the heir or the devisee were otherwise provided for by the will or not. It was then asked by

Lord ELLENBOROUGH C. J. Have you any case to shew where this court has taken notice of an equitable title in a copyhold? Does a court of law ever take notice of an equity? As a question of law there is really nothing for us to deliberate upon; and therefore we would willingly relieve you from further trouble. Lady *Harriet* never was in fact admitted, though if she had been admitted, yet according to the custom she could not have devised the premises without a surrender to the use of her will: so that there is neither an admittance of her, nor a surrender to the use of her will. Then are we to be hunting after an equity, when this Court has nothing to do but with the legal estate? For as to the admittance of the lessor of the plaintiff, that merely clothes him with a legal title to the possession, if he had before a title to the estate pursuant to the surrender; but it does no more, it will not give him a title. It is enough however to say, that Lady *Harriet* never was in fact admitted under the surrender by her father to the use of his will, and her devisee cannot be in a better situation than herself. It is impossible to sustain the argument for the lessor of the plaintiff in the total absence of any legal title: and we cannot determine who has the equity; he must go to the other side of the hall to learn that. But our opinion is, that even supposing him to have an equity, we cannot help him here.

GROSE J. declared himself of the same opinion.

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(*a*) 1 *Term Rep.* 395. (*b*) *Cro. Eliz.* 319. (*c*) *Prec. in Chan.* 573.
(*d*) 1 *Bulstr.* 200. (*e*) 1 *Ves.* 121. (*f*) 1 *Ves.* 225.
(*g*) 2 *Ves.* 77.
(*h*) 5 *Ves. jun.* 557. *Vide* Mr. *Cox's* note to *Watts* v. *Bullas*, 1 *P. Wms.* 60. 5th edit. where the principal cases on the subject are collected.

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Lawrence J. How can the admittance of Lady *Harriet*'s devisee be connected with the surrender to the use of Earl *Thomas*'s will? How, upon inspection of the court rolls, can the devisee's title be made out? There would appear a surrender to the use of Earl *Thomas*'s will, and an admittance of the devisee of another person: but the relation of the one to the other would not appear. It may indeed be considered in equity, that the heir at law of Earl *Thomas* is trustee for the devisee of Lady *Harriet;* and equity may in that case oblige the heir to surrender to such devisee; and then the title will all appear regular; but in order to ascertain whether the devisee has an equity, he must apply to a court of equity.

Le Blanc J. assented.

Postea to the Defendant.

Friday, Nov. 15th.

Sharp *against* Gladstone.

While a ship was forcibly detained in a foreign port, the owner abandoned first the *ship* and then the *freight* to the different sets of underwriters thereon, who paid as for a total loss; after which the ship was liberated, reshipped her cargo which had been taken out, and returned home, *earning freight*, which was received by the assured. Quære, Whether the assured, after an abandonment of the *ship*, (which was a *seeking* and not a *chartered* ship; on which a distinction may arise;) could abandon the *freight* to another set of underwriters? But assuming that he might, the ship and freight are *salvage* to the different underwriters, after deducting the following expences, which must be *apportioned* between them according to their several interests: 1. The expences of the ship and crew in the foreign port, including port charges, (besides the expence of shipping the cargo which exclusively belongs to the underwriters on *freight*.) 2. Insurance thereon. 3. Wages and provisions of crew from their liberation in the foreign port till their discharge here. 4. Wages (provisions were supplied by the foreign government) to the crew during their detention. But the assured was not entitled to deduct out of the freight received payable to the underwriter on freight; 1. Charges paid at the port of discharge on ship and cargo. 2. Insurance on ship. 3. Diminution in value of ship and tackle by wear and tear on the voyage home.

THE Plaintiff declared in assumpsit for money had and received, and upon the usual money counts. Plea, the general issue. At the trial at the sittings at *Guildhall* after last *Hilary* term, before Lord *Ellenborough* * C. J. a verdict was found for the plaintiff for 100*l.* and also 16*l.* for interest from the 24th of *February* 1802 to the 8th of *May* 1805, subject to the opinion of the Court on the following case. The Defendant, as owner of the Ship *Jane*, caused a policy to be effected thereon for a voyage from *Liverpool* to *Petersburgh* and back. He also caused another policy to be effected for 800*l.* *on the freight* from

Petersburgh

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Petersburgh to *Liverpool*, as interest should appear; to which last policy the plaintiff was a subscriber for 100*l*. On the 5th of *November* 1800 the ship, being at *Cronstadt* upon the voyage insured, and being a *seeking* and not a *chartered* ship, had taken on board a considerable part of her homeward cargo on freight, and the remainder was then loaded in lighters in its passage from *Petersburgh* to *Cronstadt*. The master had signed bills of lading for the cargo, which was shipped by different merchants, each upon a distinct engagement for freight. The ship would have been ready to sail in six or seven days on her voyage home: when, on the said 5th of *November* 1800, by order of the *Russian* Government, the ship was forcibly seized, the master and crew were compelled to quit her, and were marched into the interior of the country, and the cargo was relanded by the *Russians* and put into warehouses. The ship, crew, and cargo, remained in possession of the *Russians* until the 22d of *May* 1801, when the master and crew were liberated, and allowed to take possession of the ship again. The master, upon his liberation, procured the greater part, but not the whole of the original cargo to be reshipped, for which he signed new bills of lading; and the remaining part of his lading consisted of goods which were no part of the original cargo. The ship continued at *Cronstadt* for the purpose of procuring and completing her freight on the voyage home, from the 22d of *May* to the 3d of *July* 1801, when she sailed and arrived at *Liverpool* in *August*. The defendant has received the freight earned by the ship on her voyage home, the proceeds of which amount to about 1900*l*. In *February* 1801 *the defendant abandoned the ship to the underwriters thereon*, and *abandoned the freight to the plaintiff, and the other underwriters on freight*, as far as insured; and the defendant *received* from the plaintiff and the other underwriters on freight *the full amount* of their respective subscriptions *as for a total loss*. The defendant claims to have paid the following charges upon the ship and freight, a proportion of which he claims to deduct from the net proceeds of the freight received by him as aforesaid.

[26]

	£	*s.*	*d.*
Expences of the ship and crew at *Petersburgh* and *Elsineur*, including port charges, and the expence of shipping the cargo upon which the freight has been paid - - - -	305	14	0

		£	s.	d.
1805.	Insurance on the same - - - - - -	9	19	6
SHARP *against* GLADSTONE.	Wages of and provisions for the master, mate, and seamen, from the time they were liberated in *Russia* till discharged in *England*, being four months - - - - - - - - -	223	6	11
	Charges paid at *Liverpool* on ship and cargo -	91	16	5
	Insurance on ship home 3000*l.* at four guineas less returns - - - - - - - - -	90	2	0
	Wages to the master and crew during their detention in *Russia*, being six months - - -	270	0	0

The defendant also claims to be entitled to make the following charge against the freight;

[27] Diminution in the value of the ship and tackle, by wear and tear, on the voyage home; she being then employed for the benefit of those interested in the freight - - - - - - £300 0 0

The question for the opinion of the Court was, Whether the defendant were entitled to deduct a proportionable part of any and which of the said charges from the amount of the freight received? If the Court should be of opinion that he was not entitled to any deduction in respect thereof, then the verdict to stand. But if the Court should be of opinion that he was entitled to such deduction, then it was agreed between the parties that the amount of the particular charge or charges, in respect of which the Court should think a deduction ought to be made, together with the amount of such deduction, should be referred to arbitration: and the amount which the arbitrator should find should be deducted from the verdict obtained, and a verdict to be entered accordingly.

This case was argued in *Trinity* term last by *Rough* for the plaintiff, and *Scarlet* for the defendant; and again in this term by *Park* for the plaintiff, and the *Solicitor-General* contrà.

The facts were shortly these: the defendant, owner of a seeking ship in the *Russian* trade, insured *ship* and *freight* with *different* sets of underwriters on a voyage home from *Petersburgh* to *Liverpool*; and after part of the lading taken on board and the rest ready to be shipped, the ship and cargo were seized by the *Russian* government, and the crew sent into confinement; on which the owner abandoned ship and freight to the respective underwriters,

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underwriters, and received as for a total loss. And after some months elapsed the ship and crew were liberated, and returned *home with her cargo, and earned freight, which the owner received from the shippers of goods: and the principal question made was, whether in an action by an underwriter on freight to recover the freight so received by the owner, the latter were entitled to deduct certain expences incurred in prosecuting the adventure, and bringing home the ship and cargo, subsequent to such abandonment.

*[28]

The plaintiff's counsel contended, that the underwriter on freight, to whom it has been abandoned, and who has paid as for a total loss, is in the same situation as a common assignee of the freight for a valuable consideration, without abandonment, at least as against the owner of the ship and freight in whom both interests were united, and also against the underwriter on ship after severance of the interest by the abandonment: and as it is contrary to all experience that a ship-owner should charge such an assignee with expences incurred by mariners' wages, provisions, or wear and tear of the ship, however increased by the protracted duration of the voyage from contrary winds, or detainer by ships of war at sea; so neither can he be charged with such expences incurred by the forcible detention of the ship in a foreign port. For in estimating what the owner of the goods shall pay for freight, the ship-owner takes into the account all the risks, delays, and expences of the voyage, and he receives a compensation adequate to the average amount of them in the freight: then when the underwriter to whom the freight is abandoned has paid as for a total loss, he has already paid his average proportion of such expences; and he only undertakes, that if the accidents of the voyage should prevent the earning of freight from the owner of the goods, he will replace the loss to the ship-owner. The underwriter on freight therefore is, in case of loss, in the place of the owner of goods to the ship-owner, and cannot be chargeable for more than the latter would be liable for in case of the arrival of the goods. The question then must be considered the same as if the goods having arrived safe, without an intervening abandonment, and full freight being paid by the owner of goods to the ship-owner, the latter had brought an action against the underwriter on freight to recover these expences. In *Leatham* v. *Terry*, (*a*)

[29]

(*a*) 3 *Bos. & Pul.* 135.

where

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where the underwriters on freight recovered from the owner the amount of the freight which he had received after an abandonment of it to them, it was indeed intimated at the conclusion of the case that the underwriters were to contribute proportionably towards the expence of bringing home the cargo; but the point was not argued, nor any solemn decision given upon it. And in *Thompson* v. *Rowcroft* (*a*) it was considered, that after an abandonment to the respective underwriters on ship and freight, the owner or underwriters on ship, and not the underwriters on freight, at least as between them and the owner, who stood in the situation of a wrong-doer by the receipt and retention of the freight, were liable to these expences. [Lord *Ellenborough* C. J. observed, that this point was not argued in that case, but was merely thrown out at the conclusion of it.] It was there said however, that expences of this sort were not, properly speaking, salvage on the freight, but charges paid by the owner of the ship for the benefit of those to whom he abandoned it, a proportionable part of which he would be entitled to retain on his settlement with them.

[30] At the conclusion of the first, and in the course of the second argument Lord *Ellenborough* C. J. observed, that he felt great difficulty in saying, that after an abandonment of the ship by the owner to the underwriters on ship, he could abandon the freight, which seemed to follow the property in the ship, being the earnings made by the subsequent use of that which was then become the property of others, to another set of underwriters: and if he could not, then it might be considered, that having nothing of his own to abandon to the underwriters on freight, it was the same as if there had been no abandonment: in which case the plaintiff could not recover the freight from the owner. That if this had been a *chartered* ship he should have known better how to deal with the difficulty: but in the case of a *seeking* ship, as this was, he did not well know how to separate the character of owner of the *ship* from that of owner of the *freight*, where the freight was to be earned on each parcel of the goods shipped and brought home.

LAWRENCE J., who seemed to incline to the same opinion, said, (in answer to a suggestion by the plaintiff's counsel that it did not lie in the defendant's mouth to make the objection after having severed his interest, and abandoned the freight to the

(*a*) 1 *East*, 52.

underwriters

underwriters thereon; after which his receipt of the freight must be taken to have been in the character of their agent;) that the defendant might be considered as the agent of both sets of underwriters, and therefore entitled to retain whatever he was liable to pay over to the underwriters on ship. But

LE BLANC J. observing that the only questions raised for the consideration of the Court by the case reserved were, whether the defendant were entitled to make any and what *deductions* out of the freight; assuming that he was liable in the first instance to pay the freight over to the plaintiff: and it being confirmed by the counsel at the bar that no question as to the right of abandonment to the underwriters on freight was made at the trial; all *the Court* agreed that the argument should proceed upon the several items of deduction insisted upon by the defendant, as stated in the case. [31]

The plaintiff's counsel then proceeded to discuss the particular items. 1st, The expences of the ship and crew at *Petersburgh* and *Elsineur*, including port charges, and the expence of shipping the cargo. These must be taken to mean the ordinary expences which must accrue in every voyage; for the extraordinary expences arising from the hostile detention form another substantive charge. But if these could be charged on the underwriters on freight, there would be an average to be paid by them in every case, which has never been thought of before. These are expences necessarily incident to the ship-owner who charges freight in proportion. The only part of this item with which the plaintiff seems to have any concern, is the expence of *shipping the cargo*, on which the freight accrued. But as such a charge could not have been made on the owner of goods shipped, if there had been no abandonment, so it cannot be made on the underwriters on freight, who stand in his place, as against the owner of the ship: nor can the latter be put in a better situation by the abandonment than he was before. 2dly, The insurance on the expences above mentioned must be governed by the same rule. 3dly, The wages and provisions of the master and crew in the voyage home must necessarily have been incurred, without any extraordinary peril or loss for which the underwriter on freight would have been liable, and cannot be charged on him, having been once before paid for in the price of the freight. Neither, 4thly, can he be accountable for the charges at *Liverpool* on ship and cargo, which must have been paid [32]

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paid when he was off the policy, and after the freight had been earned: but such charges must either affect the owner of the ship or of the goods. 5thly, There is as little pretence for charging the underwriter on freight with the insurance home on the body of the ship itself, which from the very nature of the contract must belong to the underwriters on ship. The like observation will apply to the 7th item, the diminution in value of the ship and tackle by wear and tear on the voyage home. For the plaintiff had no interest in the body of the ship, and if the voyage had been ever so short and prosperous some wear and tear must have occurred; with the degree of it the underwriter on freight has no concern; for whether it be more or less, provided the goods arrive safe, the freight is equally earned: and though the ship had sunk immediately after the goods were delivered, he would not have been liable to contribute to the loss. The principal item is the 6th, viz. the wages (*a*) of the master and crew during their forcible detention in *Russia;* which must be admitted to be an extraordinary expence occasioned by a peril insured against: and the question is whether after abandonment it is to fall on the underwriters on *ship*, or on *freight*, or on both proportionably, or on neither of them. But if it were not to be borne altogether by the owner of ship, they contended that it would be *general average*, being incurred
[33] for the benefit of the whole adventure. The case of *Robertson* v. *Ewer* (*b*) only decided that wages and provisions during a detention were not a charge upon the underwriters on ship; but not that they were to be borne by the underwriters on freight. [*Le Blanc* J. observed that there was no abandonment in that case.] It was not determined on whom the loss should fall in case of an abandonment, and it was not said that the owner himself should not bear it. In another case indeed of *Eden* v. *Poole*, (*c*) Mr. Justice *Buller* said that the underwriters on freight and

(*a*) Wages were considered to be payable to the master and crew in *Beale* v. *Thompson*, 4 *East*. 546.

(*b*) 1 *Term Rep.* 127.

(*c*) Sittings after *Hil.* term 1785 at *Guildhall*. The dictum here referred to is to be found in a note of that case in *Park* on Insurance, ch. 2., where it is said to have been contended on the part of the insurer on ship, "and so held by Mr. Justice *Buller* that the *freight*, and *not the ship*, was liable for this loss;" *i. e.* the expences of wages, provisions, &c. during detention by a governor in a foreign port. A note of the

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and not those on ship were liable to those charges: but as to the freight, that was merely a *dictum*, and not a point necessary to be decided; as that was an action against the underwriter on ship; and in subsequent cases it has been considered not as a charge on freight alone, but as *general average;* which is the opinion of general writers, *Beawes Lex Merc.* 150. and 1 *Magens*, 67., and agrees with the ordinance of *Lewis* XIV. tit. *Average*, art. 7. And such seems to have been the opinion of Lord *Mansfield* in *Lateward* v. *Curling* (*a*) and in *Da Costa* v. *Newnham*, (*b*) where a ship had put into port in the course of her voyage, for the benefit of all concerned, the charges of loading and unloading the cargo and taking care of it, and the wages and provisions of the workmen hired for the repairs wanted, were deemed to be general average.

[34]

Lord ELLENBOROUGH, C. J. observed, that strictly speaking the term *general average* was more usually taken to mean *a sacrifice* or loss of part of the adventure for the benefit of the whole; but that this was an additional expence incurred for the benefit of all. It was for the interest of all the parties that the ship's crew should be kept in a state to navigate her home with the cargo; and if for the benefit of all, was it not fair that the expence should be divided proportionably?

For the defendant it was argued, that as by our law freight was the subject of separate insurance, so abandonment and salvage were incident to it as to other subjects of insurance. If the ship and cargo be sunk for a time, or the voyage lost or interrupted, so as to afford no present prospect of saving the one or prosecuting the other with effect, the assured may abandon, and the underwriter is liable to pay as for a total loss: but in return for this he has the benefit of salvage; and in case of any loss,

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the same case is given at the end of the report of *Robertson* v. *Ewer*, 1 *Term Rep.* 132. in which it is only stated that Mr. Justice *Buller* was of opinion that these charges were not allowable *on such a policy*. And on referring to my own MS. from whence the printed note was taken, I do not find any opinion of the learned judge as to the exclusive liability of the *freight* for such charges, though that was contended for by Mr. *Lee*, who was counsel for the underwriters on ship, who said that it was so determined every day.

(*a*) *Guildhall*, sittings after *Trin.* 1775. *Park on Insur. ch.* 7. tit. General or Gross Average.

(*b*) 2 *Term Rep.* 407.

the

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the assured by himself, his servants, &c. is bound by a stipulation in every policy, " to sue, labour, and travail for" the recovery, &c. of the ship and goods; which is for the benefit of the underwriters. Whatever expence therefore is incurred in so doing is incurred by the assured in the character of agent for the underwriters; and whatever is saved is for their benefit who are entitled to salvage; but *salvage* is not, properly speaking, the *thing saved*, but the balance of its worth after *deducting* the expence of saving it. Though nothing were saved, the underwriters would still be liable for whatever expence was bonâ fide incurred in the attempt; the assured being bound to sue labour and travail for them; and the assured would stil be entitled to receive as for a total loss. Here the voyage was finally prosecuted with effect after the abandonment: the thing saved was *freight;* in doing which certain expences were incurred, without which no freight would have been saved: but as the underwriter can claim nothing but salvage, and *salvage* is *the thing saved after deducting the expences,* therefore the assured who derives no benefit to himself from the freight ought to be paid the expences incurred in saving it for the benefit of the underwriters on freight. The opinions thrown out in *Thompson* v. *Rowcroft*, (*a*) and *Leatham* v. *Terry*, (*b*) were without argument, and at the moment.

[35]

With respect to the particular items, it was observed, that part at least of the first, the expence of shipping the cargo, ought exclusively to be borne by the underwriters on freight, being altogether for their benefit; and that the other expences upon the ship and crew, and the port-charges abroad, including the duties for passing the *Sound*, without which no freight could have been earned, ought also to be paid by those who alone profited by the home voyage, or at least they should bear a proportionable share; (which it was said might be settled by some person out of court cognizant of such matters.) That the 2d item, viz. the insurance on the above, would follow the same rule. [Lord *Ellenborough* observed on the argument, that the charge of duties on the ship could not form an article of *general average*, as they would have been payable at all events whether the ship had returned home early or late.] 3dly, As to seamen's wages and provisions from the liberation of the ship in *Russia* till her discharge at *Liverpool*: those, it was said, would come

[36]

(*a*) 1 *Term Rep.* 89. (*b*) 3 *Bos. & Pul.* 165.

under

under *general average*. [On which Lord *Ellenborough* observed, that that would only apply to such of those charges as were occasioned by the detention, which must be first ascertained.] Part at least, it was answered, was incurred by the delay of re-shipping the cargo. [It was here suggested on the first argument by the defendant's counsel, that the better way would be for the Court to decide whether the particular items formed general average or salvage; and that then the proportions should be left to arbitration; which seemed to be assented to.] 4thly and 5thly, The charges paid at *Liverpool* and the insurance on the body of the ship were not insisted upon. The 7th item, as to the wear and tear of the ship, it was said, ought to be apportioned, if, as was contended, the ship was then employed in earning freight for the benefit of the underwriters on freight, and not of the other underwriters who by the abandonment were the then owners of the ship. As to the 6th and principal item, the wages of the master and crew during the detention, they relied on the cases of *Robertson* v. *Ewer*, (*a*) explained *Brough* v. *Whitmore*, (*b*) and the two nisi prius cases cited of *Fletcher* v. *Poole*, and *Eden* v. *Poole*, particularly for the opinion of *Buller*, J. in the latter, as given in *Park on Insurance*, and again in *Da Costa* v. *Newnham*, (*c*) to shew that provisions, not forming part of the original outfit of the ship, but expended during a detention of a ship in a foreign port, and wages accruing during such detention, were not to be paid for by the underwriters on ship, but out of the freight. And it was observed, that this was either to be considered as a total loss with benefit of salvage, or a partial loss with general average.

[37]

Lord ELLENBOROUGH, C. J. As no question arises now upon the effect of the abandonment of the freight to the underwriters on freight after an abandonment of the ship to the other set of underwriters; but the abandonment in this case is assumed to have been properly made, and to have conveyed a right to the freight to the plaintiff, subject to any and whatever deductions the assured may be entitled to make: and as it is agreed to consider each set of underwriters as in the place of the assured for the respective interests insured which have been abandoned to them; then the underwriters on freight to whom it has been abandoned, having paid as for a total loss, are entitled to the

(*a*) 1 *Term Rep.* 127. (*b*) 1 *Term Rep.* 266. (*c*) 2 *Term Rep.* 411.

benefit

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benefit of salvage, and the net salvage is that which remains of the subject-matter after payment of the expences of saving it. After the abandonment the assured was to be considered as the agent of both sets of underwriters, and he laid out what was necessary for the benefit of the whole concern, without applying the several proportions to each at the time for their separate interests. But each set of underwriters is entitled to have their respective salvage, subject to the deductions applicable to each. With respect then to the particular items, the charges paid at *Liverpool* are to be struck out; and so is the insurance on the ship which can be no charge upon the freight; and so must the last item, of diminution of the value of the body of the ship and tackle by wear and tear. The remaining items must be considered as so many deductions from the salvage, which must be apportioned according to the respective interests
[38] of the two sets of underwriters in the judgment of the persons to whom the same are agreed to be referred. The expence of putting the cargo on board was certainly altogether for the benefit of the underwriters on the freight; and the expences of *Petersburgh* and *Elsineur* must be apportioned. As to the general question, whether an abandonment could be made to the underwriters on freight after an abandonment to the underwriters on ship, I beg to be understood as giving no opinion; and with respect to that, this not being the case of a *chartered* but of a *seeking* ship, a distinction may arise.

Per Curiam, Postea to the Plaintiff, subject to the deductions to be made upon the items referred.

ANDERSON, Bart. and Another *against* The ROYAL EXCHANGE Assurance COMPANY. *Tuesday Nov. 19th.*

A vessel sailing with *corn* insured, from *Waterford* in *Ireland* to *Liverpool*, by a policy with a memorandum, to be free from all but general average, was stranded near *Waterford* on the 28th of *Jan.*, and the vessel continued at high tide under water for near a month during which time, from the 31st, the assured at low water were employed in saving the cargo, the whole of which was damaged, but the greater part recovered and kiln-dried: but no notice of abandonment was given to the underwriters in *London* till the 13th of *February*, though there is a constant regular intercourse between *Waterford* and *Liverpool*, where some of the assured lived; which was holden to be out of time.

THIS was an action upon a policy of insurance to recover a total loss on a cargo of wheat in the ship *Fanny*, on a voyage from *Waterford* to *Liverpool*; plea the general issue. At the trial at the sittings after *Hilary* term 1805, before Lord *Ellenborough* C. J. a verdict was *found for the Plaintiffs, damages 915*l.* 9*s.* 8*d.* subject to the opinion of the Court on the following case.

The ship *Fanny* was loaded at *Waterford* in *January* 1804, with a certain quantity of wheat in bulk, equivalent in measure and quantity to 2406 barrels. The insurance was effected on account of *A. Comber* of *Liverpool*, merchant, upon 696 barrels of the said wheat, his property; and the same were shipped by *T. Nevins*, who acted as his agent at *Waterford*, and were of the value of 1000*l.* the sum insured. The policy contains the following stipulation, "Free from all average on *corn*, flour, fish, "salt, fruit, seeds, hides, and tobacco, unless general or other- "wise, specially agreed." There was no special agreement in the policy, respecting the payment of an average loss on corn. The *Fanny* sailed from *Waterford* on the voyage insured on the 28th of *Jan.* 1804, with the wheat insured on board, and in proceeding down the river she struck upon a rock, which occasioned her immediately to fill with water, and, to prevent her from sinking, she was run on shore. The hull of the ship was for *four weeks* entirely under water at high water, and until the cargo was taken out she could not be raised or removed. The whole of the cargo was damaged. 1635 out of the said 2406 barrels of wheat were taken out of the ship and afterwards kiln-dried at *Waterford*. The said 1635 barrels first began

where there is a constant regular intercourse between *Waterford* and *Liverpool*, where some of the assured lived; which was holden to be out of time. For whether or not upon such a policy, where there was an opportunity of sending on the corn which was saved to the place of its destination within two months after the accident in another vessel, the assured were entitled to abandon as in case of a total loss; at all events they ought to have made their election to abandon within a *reasonable time*, (on which it seems that the Judge ought to instruct the jury under the circumstances of the case,) and they cannot take the chance of endeavouring first to save and make the best of the cargo on their own account, and afterwards abandon when they find that they cannot turn it to their advantage.

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gan to be taken out on the 31st of *Jan.* 1804, and continued from time to time taking out until the vessel was raised. *A. Comber's* proportion of the 1635 barrels so taken out amounted to 473 barrels, which were delivered to *T. Nevins* as his agent. Some part of the remainder of the cargo of wheat was sold to feed hogs, and the residue thereof was* thrown into the sea as unfit for use. The whole quantity kiln-dried, as before stated, except the 473 barrels belonging to *A. Comber*, was, two months after the accident happened, shipped on board another vessel for and arrived at *Liverpool*, and was received by underwriters on *policies including losses by stranding*, and the 473 barrels belonging to *A. Comber* might have been forwarded in like manner if he had given directions for that purpose. The 473 barrels were sold by *T. Nevins*, and produced 249*l.* 1*s.* 9*d.*: but the expence of saving and kiln-drying the same reduced the net proceeds thereof to 95*l.* 13*s.* 4*d.*, which sum has been remitted to and received by the plaintiffs. After the ship had remained four weeks in the situation before described, she was weighed up and taken back to *Waterford*, then incapable of prosecuting the voyage, and continued under repairs until the latter end of *April*, by which time she was repaired. On the 18th and 25th of *Feb.* 1804 the plaintiffs and also *A. Comber* gave notice of abandonment to the defendants; but the defendants refused to accept such abandonment. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover in this action as for a total loss, with benefit of salvage: and if not, then as for a total loss of that part of the goods in question which was not kiln-dried? If the Court should be of opinion that the plaintiffs were entitled to recover as for a total loss of the whole cargo, with benefit of salvage, then the verdict to stand: but if the Court should be of opinion that the plaintiffs were entitled to recover only as for a total loss of that part of the goods in question which were not kiln-dried, then a verdict to be entered for the plaintiffs for 356*l.* 16*s.* only. And in case the Court should be of opinion that the plaintiffs were not entitled to recover any part of the sum demanded, then, a verdict to be entered for the defendants.

* [40]

[41]

J. Clarke for the plaintiffs contended, that this was a total loss, and consequently took the case out of the memorandum in the policy. The general principle is, that where in consequence of an accident to the ship the voyage is lost, though

part

part of the goods be saved, yet if that part do not reach the port of its destination for the benefit of the owner, it is, as to him, a total loss. As in *Manning* v. *Newnham*, (*a*) where the ship, freight, and goods having been warranted free of *particular* average assimilates the case to this: the ship was obliged by stress of weather and distress to put back to *Tortola* three days after she sailed from thence on the voyage insured to *London*, but the cargo was not damaged, and sold there for within an 18th of its value; and though the greater part of it might have been sent home in two ships which happened to be at *Tortola*, and have sold at a great profit; yet the Court held, that as the voyage was totally lost the assured might abandon. This rule applies particularly to the case of a perishable cargo, where the loss of a voyage within a given time necessarily causes the loss of the cargo itself. It is otherwise where the corn itself arrives at its port of destination, however damaged; as in *Mason* v. *Skurry*; (*b*) and that turned principally upon the evidence of usage in trade. The case of *Cocking* v. *Fraser* (*c*) is distinguishable from the present: for there the ship remained sound, and [42] after throwing some of her cargo (fish) overboard for the preservation of the ship and cargo, was only prevented from continuing her voyage to the place of destination with the rest by the badness of it, which made it not worth while to proceed. It was therefore a *voluntary* renunciation of the voyage by the assured: and this was holden to be only a partial loss, for which the underwriter was not liable. That the loss of the voyage is considered as a total loss appears by several cases; *Goss* v. *Withers*, (*d*) *Hamilton* v. *Mendez*, (*e*) and *McAndrews* v. *Vaughan*. (*f*) Now here the voyage was totally lost to the assured; for the ship was sunk, and the corn never arrived at its place of destination; and therefore it was competent for him to abandon.

Lord ELLENBOROUGH, C. J. Is there any case where the loss of the voyage has been holden to be in itself a total loss; or is it not a cause of abandonment only: and then must not the

(*a*) *Tr.* 22 *Geo.* 3. 2 *Marshall*, 505. and *Park*, 169. S. C. It does not appear when the abandonment was in this case.

(*b*) *Guildhall*, sittings after *Easter*, 1780. *Park*, 116. 1st edit. 131. and 1 *Marshall*, 143.

(*c*) *E.* 25 *G.* 3. *B. R. Park*, 114. 1st edit. 129. 1 *Marshall*, 144.

(*d*) 2 *Burr.* 683. (*e*) Ib. 1209. (*f*) *Park*, 115.

assured

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ANDERSON *against* The ROYAL EXCHANGE Assurance Company.

assured abandon in due time, while for aught appears, the loss continues a total one in that sense? As if in this case the assured had abandoned while the thing insured continued under water. Now here it was three weeks or near a month before the abandonment; and all the intermediate time the assured took to the ship and cargo, and worked at it as upon their own account; and did not elect to abandon till a considerable part of the cargo was taken out. It has been determined in a variety of cases that a party must abandon within a reasonable time, otherwise he waves his right: there lies the difficulty; for there is a constant intercourse between *Waterford* and *Liverpool*, and the assured must have known of the loss long before the 25th, or even the 18th of *February*. It may however be material to know when they had the first notice of it.

[43]

It was then suggested by the plaintiff's counsel that in fact the offer to abandon was made before the 18th, and refused by the underwriters; after which a more formal notice was given on the 18th.

Lord ELLENBOROUGH, C. J. Let the case then stand over, and see if it can be amended by the addition of the fact suggested. We can only pronounce on the case presented to us, and on that case, as it appears to us at present, we are of opinion that the abandonment was out of time. It was not in fact, as it turned out, a total loss; but during the time it was submersed in the water it might have been treated as such; they did not however treat it as a total loss at that time, but continued labouring on the vessel and cargo on their own account for some time afterwards, from the 31st of *January* till the 18th of *February*, and had succeeded in preserving part of it, and did not elect to abandon till they found that it would not answer to keep to the cargo; and when they did abandon it was no longer in fact a total loss. But an abandonment must be made within a reasonable time: and I rather conceive that it is the province of the Judge to direct the jury as to what is a reasonable time under the circumstances.

LE BLANC, J. The assured must not take the chance of endeavouring to make the best of the accident for himself, and when he finds that it does not answer, then to abandon to the underwriters.

Per

Per Curiam, Let there be judgment nisi for the delivery of the postea to the defendant, unless in the course of the term any additional facts can be stated to alter the case.

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ANDERSON *against* The ROYAL EXCHANGE Assurance Company.

Park, who was counsel for the defendants, observed, in the course of the argument for the plaintiffs, upon the case of *Manning* v. *Newnham*, that Lord *Mansfield* relied in his judgment on the circumstance, that the *whole* cargo could not be re-shipped and forwarded to the place of its destination, and that the assured was not bound to ship *part* only. And he also referred to *Allwood* v. *Henekell*, (*a*) where Lord *Kenyon* said, that "the assured must make his election speedily whether he will abandon or not. He cannot lie by, and treat the loss as an average loss, and take measures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them."

On a subsequent day an affidavit was produced on the part of the plaintiffs, by which it appeared that the assured had received notice of the loss on the 2d of *February* by letter, which was immediately communicated to some of the members of the Company, with an offer to abandon, who declined to accept such abandonment, but referred the assured to their committee, who afterwards confirmed the refusal, contending that it was only a case of average loss: in consequence of which the formal notices stated in the case were sent. It was therefore proposed that the notice of abandonment should be stated as having been given on the 4th, instead of the 18th and 25th, but this not being acceded to on the part of the defendants, the Court awarded a new trial.

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(*a*) Sittings after *Mich.* 1792, *Park*, 172.

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Wednesday. Nov. 20th.

The KING *against* The Inhabitants of LONG BUCKBY.

The Sessions presumed that an indenture of apprenticeship executed 30 years before, and under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, and proved to be lost, and when the parish in which he was settled under such indenture had relieved him for the last 12 years, was *properly stamped* in proportion to the apprentice fee of 12*l.* received by the master: although the deputy register and comptroller of the stamp duties proved that it did not appear in the office that any such indenture had been stamped or inrolled during that period: and the judgment of the justices was confirmed in *B. R.*

TWO justices by an order removed *William Lee*, *Sarah* his wife, and their children by name, from the parish of *Long Buckby* in the county of *Northampton*, to the parish of *Newport Pagnell*, in the county of *Bucks*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case.

The pauper, *William Lee*, who was the illegitimate son of *Mary Lee*, was born in the parish of *Newport Pagnell*, and in the year 1774 or 1775 was bound apprentice by indenture to *John Dickens* of *Long Buckby*, shoemaker, for seven years, for a premium of 12*l.* which was paid, and the indenture regularly executed by the pauper, his mother, and *Dickens*, the master, with whom the pauper served his full time in *Long Buckby*. Only one indenture was executed, which after seven years was given to the pauper, and was proved to have been lost. For 12 years past the pauper had resided at *Long Buckby*, during which time he had been often relieved by that parish, and had received *town's money* from it; which *town's money* is given away at *Christmas* to *parishioners;* and no further evidence was given by the appellants. But the respondents proved by the deputy register and comptroller of the apprentice duties, that it did not appear that any such indenture had been stamped with the premium stamp, or *inrolled, from the year 1773 to the 16th of *July* 1805. The respondents insisted that the appellants ought to have given further proof of the payment of the duty, and of the inrollment: but the Court were of opinion that after the length of time elapsed they might presume that all had been rightly done. And the pauper having done no other act to gain a settlement, the order was quashed.

When this case was called on, *Dayrell* and *Beauclerk* were to have supported the order of Sessions: but *The Court* desired to hear what objection could be urged against the presumption which the justices had made from length of time, which did not appear to be an unreasonable presumption.

Morrice, contrà, said, that the justices could not properly presume that every thing had been rightly done when the indenture was executed, against the evidence adduced by the stamp officer to shew that the duty had not been paid; for if

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the duty had been paid, the presumption was that it would have been inrolled at the head office in *London*, in the usual and proper manner.

Lord ELLENBOROUGH C. J. The question before the justices was, whether the presumption that all was rightly done, after the lapse of so many years, were sufficiently rebutted by the negative evidence of the officer: they thought not, and we cannot say they have done wrong; for the presumption of law is to be favoured; and against the negative evidence they may have set the possibility of an irregularity in the returns made to the office.

Per Curiam, Order of Sessions confirmed. (*a*)

(*a*) Vide *Rex* v. *East Knoyle*, *Burr.* S. C. 151. and *Rex* v. *Badby*, 1 *Const.* 490.

BOARD, one, &c. *against* PARKER.

Wednesday, *Nov.* 20th.

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Attornies *plaintiffs* are not within the *London* Court of Conscience act 39 and 40 *Geo.* 3. *c.* 104. compellable to sue there for a debt under 5*l.* at the peril of costs.

THE Plaintiff, who was an attorney of this Court, residing in *Bath*, did business there for the Defendant, and brought his action in *B. R.* for 4*l.* 19*s.*, as appeared by the bill of particulars, and obtained a verdict for 4*l.* 8*s.* 6*d.* at the last assizes at *Bridgewater*. And a rule was obtained in this term, calling upon the plaintiff to shew cause why a suggestion should not be entered on the roll under the stat. 39 & 40 *Geo.* 3. *c.* 104. (local acts) that the original cause of action did not exceed 5*l.*, and that the same was recoverable in the Court of Requests of the city of *London:* which rule was founded upon an affidavit, that at the time of the debt contracted, and of the action commenced, and from thence hitherto the defendant was an inhabitant of and resident within the city of *London*, and liable to be sued in the said Court of Requests.

Lens Serjt. and *Burrough* shewed cause against the rule, and contended that *attornies*, *plaintiffs*, were not within the act, though attornies, *defendants*, were brought within it by the 10th clause. The preamble recites doubts whether "attornies and "solicitors, and other officers of any of the courts of law or "equity were *subject to the processes* of the said court," which can only apply to such persons sued as *defendants;* and then the

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10th clause enacts, "that no *privilege* shall be allowed to *exempt* any person from the jurisdiction of the said court on account of his being an attorney, &c., but that all attornies, &c. shall be *subject to* the several *processes, orders, judgments, and executions* of the said court, in the same manner as any other persons," &c. Now *plaintiffs* cannot be subject, as such, to *processes* or *executions;* and though *judgment of nonpros* would apply to them, yet taking the words in the order in which they stand, it appears that the *judgments* meant were judgments against those thereby made *subject to process*, especially as followed by *executions*. And the operation of the whole clause was to prevent such persons from availing themselves of their privilege to be sued in their own courts. Besides, there is good reason for the Legislature making a distinction in this respect between attornies *plaintiffs* and attornies *defendants;* for if the former were within the Court of Conscience act, they would be let loose from all the the restraints of the stat. 2 *Geo.* 2. *c.* 23. s. 23. where the demand was for less than 5*l.* They then referred to *Gardner* v. *Jessop*, (*a*) where it was holden that an attorney *defendant* was not within the *Middlesex* Court of Conscience act, (*b*) containing words as general as the general provision in the act in question; which construction was confirmed in *Wiltshire* v. *Lloyd*; (*c*) and to *Hussey* v. *Jordan*, (*d*) cited in the latter case, where a *plaintiff* attorney was determined not to be within it.

Pell, in support of the rule, relied upon the positive provisions of the stat. 39 & 40 *G.* 3. *c.* 104. including *attornies* by name. There was no question, even before that act, that attornies *plaintiffs might* sue in the *London* Court of Conscience as it existed under the former acts; the only question was, Whether attornies *defendants* were subject to the process of the Court, of which the doubt is recited in the preamble: then the 10th section expressly enacts, "that no privilege shall be allowed to exempt *any* person from the jurisdiction *on account of his being an attorney*," &c. than which nothing can be more general, to include attornies *plaintiffs* as well as *defendants;* and then it proceeds, "that all attornies, &c. shall be subject to the several "processes, *orders, judgments*, and executions of the said court, "in the same manner as *any other persons* are subject," &c.;

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(*a*) 2 *Wils.* 12. (*b*) 23 *Geo.* 2. *c.* 33. (*c*) *Dougl.* 331.
(*d*) *B. R. T.* 25 *Geo.* 3. *ib.* 382.

using

using the same words as occur in the 5th section, which certainly includes *plaintiffs* as well as *defendants*. Then the case of attornies being declared by the 10th sect. not to be exempted from the operation of the act, the general words of the 12th sect. will attach upon them as well as upon others.

Lord ELLENBOROUGH C. J. The case of attornies plaintiffs having been holden not to be within the act of the 23 *Geo.* 2. *c.* 33. establishing the *Middlesex* Court of Conscience, the words of which are equally general with the act in question, the same reason holds for determining that attornies plaintiffs are not within the latter. And this act itself furnishes a ground for this construction in aid of the established precedent; for it recites a doubt whether attornies were subject to the *process* of the *London* Court of Requests, which can only apply to attornies *defendants*, and then by *s.* 10. it expressly *subjects* attornies to the several "*processes*, orders, judgments, and *executions*" of the said court: which words, standing in that order, and with reference to the doubt stated in the preamble, must be taken to refer to *defendants;* and then the maxim applies that expressio unius est exclusio alterius. It therefore seems that the Legislature itself meant to make the distinction. And if the meaning of the act of parliament were only doubtful, it certainly is one [50] which the court would not be inclined to extend the construction of beyond what they were compelled to do by the terms of it: for it is sufficiently hard upon any person, residing perhaps at a great distance from *London*, to be compelled to go and prosecute his suit there for a trifling sum because his debtor lives there.

The other Judges concurred upon similar grounds.

Rule discharged.

The like rule had been obtained in another case of *Hodding* v. *Warrand*, in this term, under circumstances similar to the above, with this difference only, that both plaintiff and defendant were attornies: against which *Burrough* and *Casberd* were to have shewn cause; but *Erskine* and *Comyn* abandoned it, as not being distinguishable from this case.

1805.

Friday, Nov. 22d.

MACMICHAEL *against* JOHNSON and Others.

An allegation that a co-defendant was *by due course of law outlawed at the suit of the plaintiff in this plea and suit,* is sufficient without a *prout patet per recordum.*

THE declaration stated, that the Defendants and one *H. G. Macnab, which said* H. G. Macnab *by due course of law, has been outlawed at the suit of the Plaintiff in this plea and suit,* and still remains so outlawed, heretofore, to wit, on, &c. at, &c. according to the usage and custom of merchants, made their certain bill of exchange, &c. and so the plaintiff proceeded to count in the usual form as the payee of the said bill, which was dishonoured, against the drawers. To this there was a demurrer, stating for special cause, that it is not alleged in the declaration that there is any *record* of the supposed outlawry therein mentioned, nor has the plaintiff offered to verify his allegation by the same record; and that neither the time of the outlawry was mentioned, nor that *Macnab* was outlawed in the court of our lord the king before the king himself: and joinder.

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W. E. Taunton, in support of the demurrer, said that the allegation of the outlawry should have run thus; "which said *H. G. Macnab* by due process of law had in the court of our lord the king, before the king himself here, was and still is outlawed at the suit of the plaintiff in this same suit in the same court of our said lord the king, as by a record thereof now remaining in the said court and in full force appears." And this, he said, ought to be alleged in order to enable the defendants to take a specific issue upon the existence of the record itself of outlawry; for to a proper averment of outlawry nun tiel record may be pleaded: (*a*) In *Gye* v. *Goddard,* (*b*) in case upon a joint contract against two, one was outlawed, and before declaration against the other it was entered on the roll "*Et sciendum est quod* A. B. (the party outlawed) *is outlawed;*" and this was holden to be no sufficient averment of outlawry, and judgment against the other was thereupon arrested. And in *Symonds* v. *Parmenter and Bar-*

(*a*) *Coutanche* v. *Le Rue,* 1 *East,* 133. and *Nowlan* v. *Geddes,* ib. 634.

(*b*) 1 *Sid.* 173. The same case is reported 1 *Keb.* 642, where it is said to have been adjourned: and one of the objections there taken was, that it was not said that the defendant was outlawed *super brevi illud:* and another was, that the *sciendum* was no express averment; especially as there placed.

row

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MACMICHAEL *against* JOHNSON.

row, (*a*) which was a joint action, the reporter states, that in the declaration the *record* of outlawry against *Barrow* was set forth, *as was necessary*; and the defendant *Parmenter*, craved oyer * of the original writ and *record* of outlawry, and then pleaded *nul tiel record*. So in *Wightman* v. *Mullens*, (*b*) in an action against the marshal for an escape, it was alleged that the prisoner was committed to the custody of the marshal at the suit of the plaintiff, *as by the said commitment may more at large appear*; and this was holden ill on special demurrer, because it did not appear that the commitment was *of record*, till when the prisoner was not in point of law in the marshal's custody. That, as well as the present, was the case of a collateral averment.

* [52]

Marryat contrà was stopped by the Court.

Lord ELLENBOROUGH C. J. If this had been an averment of some extrinsic record there might have been some foundation for the objection, that it is not pleaded with a *prout patet per recordum*; but this is no averment of any collateral record, but that the other defendant has been outlawed at the suit of the plaintiff *in this plea and suit* now pending: so that the very record now before the Court is the thing which verifies that averment. And no one instance can be produced where an outlawry in the same suit has been deemed necessary to be pleaded with a *prout patet*. What is said in the report of *Symonds* v. *Parmenter*, as to the necessity of setting forth the record of outlawry against a co-defendant, is merely the language of the reporter, for which there is no foundation: all that the Court decided there was, that if the outlawry were set forth, it must appear to be consistent with the other proceedings in the cause stated on the record; and that if it were not, advantage might be taken of it.

The other Judges concurred, and *Lawrence* J. added, that it had never been usual in his own experience or in that of any of his brethren, some of whose experience in pleading had been very extensive, to allege the outlawry of a co-defendant in the suit with a prout patet, &c. And on reference to the more ancient precedents he could find no such averment in *Brownl. Rediv.* 197. 1 *Lill. Entr.* 20. 1 *Brown.* 177. He also referred to *Impey's Pleader*, 341.

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Judgment for the defendant. (*c*)

(*a*) 1 *Wils.* 78. 86. 97. (*b*) 2 *Stra.* 1226.

(*c*) In *Saunderson and another* v. *Hudson*, 3 *East*, 144. the allegation of outlawry was, "which said *J. S.* and *J. D. L.* have been in due manner outlawed

1805.

Friday, *Nov.* 22d.

It is a good plea to an action on a promissory note and for money lent, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay to them the money claimed by the plaintiff: and it is no good replication that the causes of action accrued after the plaintiff became bankrupt, and that the defendant treated with the plaintiff as a person capable of receiving credit in those behalves, and that the commissioners had made no new assignment of the said notes and money: for the general assignment of the commissioners passes to the assignees of the bankrupt all his *after* acquired as well as present personal property and debts.

KITCHEN *against* BARTSCH.

IN assumpsit, the first count was upon a promissory note made by the Defendant on the 15th of *August* 1801, to the Plaintiff for 50*l.* payable eight months after date. The second count was upon another promissory note for 30*l.* payable to the plaintiff at six months after the same date. And the sixth count was for money lent. Upon all the other counts a noli prosequi was entered. Pleas; 1. Non-assumpsit. 2. That the plaintiff before the promises and causes of action in the declaration mentioned being a trader, &c. and indebted to *W. S.* in 100*l.*, became a bankrupt; and thereupon a commission of bankrupt issued on the 5th of *June* 1801, of that date, on the *petition of *W. S.* by virtue of which he was duly declared a bankrupt; and that afterwards, and before the making of the promises, viz. on the 7th of *July* 1801, by indenture made and signed by three of the commissioners (in the custody of *W. S.* and *S. D.* and not of the defendant) "all and singular the goods, chattels, wares, and merchandizes, effects, debts, sum and sums of money, and all other personal estate whatsoever whereof the plaintiff was possessed, interested in, or entitled unto at the time he became a bankrupt, *or at any time since*, and all the estate, right, title, interest, equity of redemption, property, claim, and demand whatsoever of the plaintiff of, in, or to the premises, or any part thereof, were in due manner, bargained, sold, assigned, and set over to the said *W. S.* and *S. D.* in trust for the benefit of the creditors of the plaintiff." And that the several promises and causes of action in the declaration mentioned were first made and first accrued to the plaintiff after the time when he was so adjudged a bankrupt, viz. on the said 15th of *August* 1801; and that the plaintiff has never obtained his certificate. That after the making of the promises, &c. viz. on 1st *November*, 1804, the said *W. S.* and *S. D.* as *assignees* as aforesaid, *required the defendant to pay to them* the several sums in the declaration mentioned, supposed to be due from the

outlawed in the said court of our said lord the king before the king himself, and still are, remain, and continue outlawed;" and this was holden not to be sufficient without adding that they were outlawed *in that suit*: but no *profert pulet* was contended to be necessary.

defendant

defendant to the plaintiff; by reason of which promises, and of the said indenture, and by force of the statutes, &c. the said *W. S.* and *S. D.* as such assignees, &c. *became and were entitled to* the several sums and causes of action in the declaration mentioned, if any such there are, &c. Replication; That the promissory notes in the first and second counts were made by the defendant to the plaintiff, and the money in the sixth count was lent by the plaintiff to the defendant, after the plaintiff became a bankrupt, [55] and after the issuing of the commission, and after the making of the assignment in the last plea mentioned; and that the several promises and causes of action, &c. accrued to the plaintiff after he became a bankrupt, and after the said commission and assignment, &c.: and that the defendant, at the times when the said promissory notes were made and delivered by him to the plaintiff and when the said money was lent, &c. *treated with the plaintiff as a person capable of receiving credit in those behalfs.* And that the said commissioners, &c. *have not at any time since the making the said notes*, &c. nor since the said money was lent, &c. nor at any time since the several causes of action, &c. accrued, *bargained, sold, assigned, or set over* to the said *W. S.* and *S. D.* or to any person in trust for the creditors of the plaintiff the said promissory notes or the said money mentioned to be lent, &c. or any of the estate and effects of the defendant which accrued or came to the plaintiff since the making of the assignment in the plea mentioned, &c. General demurrer, and joinder.

Richardson, in support of the demurrer, contended, 1st, that the general assignment of the bankrupt's estate and effects from the commissioners to the assignees passed the *future* as well as present personal property of the bankrupt, and, 2dly, that notwithstanding the defendant may have, as it is said, treated with the plaintiff, the bankrupt, as a person capable of credit, yet he may still dispute his right to recover after notice from the assignees. 1st, It is not necessary to question but that a bankrupt is entitled as against all others than his assignees to future earnings made after his bankruptcy. But he has only a qualified right, subservient to that of his assignees. The stat. 13 *Eliz. c. 7. s.* 11. first gave the *future* effects of a bankrupt to his creditors whose debts remained unsatisfied. And in *Fowler* v. *Down*, (*a*) where the Court held that an uncertificated bank- [56]

(*a*) 1 *Bos. & Pul.* 44—48.

rupt

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KITCHEN *against* BARTSCH.

rupt might maintain trover for goods assigned to him as a security for money advanced by him after his bankruptcy, and which were in the hands of a third person, *Heath* J. stated that the ancient practice was for the commissioners to assign specific parts of the bankrupt's property to each particular creditor, till the stat. 5 *Geo.* 2. *c.* 30. which directs the choice of assignees for the benefit of the creditors, when it became the practice to make a general assignment. And the distinction was taken by Lord *Hardwicke* in the case *Ex parte Proudfoot*, (*a*) that all *future personal* estate is affected by such assignment, and that every new acquisition vests in the assignees: but that as to *future real* estates, there must be a new bargain and sale. And this, as applicable to *personal* estate, was recognized in *Evans* v. *Mann* (*b*) and in *Martin* v. *O'Hara*. (*c*) In *Tudway* v. *Bourn* (*d*) there was indeed a second assignment in fact made of a *legacy* which had been bequeathed to the bankrupt after his bankruptcy; but that was *ex abundanti cautela*, and no opinion given as to the necessity of it. The only dictum in support of the necessity of such a subsequent assignment of personal property acquired after the bankruptcy is the extra-judicial opinion of the Lord C. J. *Eyre*, in *Fowler* v. *Down*; for the only point necessary to be decided, and on which the rest of the Judges did decide the case, was that as against all the world *except the assignees* the bankrupt had a property in after-acquired goods: and it is
[57] clear that even a special property is sufficient to maintain trover; as in *Armory* v. *Delamirie*. (*e*) But here the assignees have disaffirmed the property in the bankrupt; and the Court must presume that there are unliquidated debts of the bankrupt remaining; the commission still subsisting, and no certificate having been granted, and the assignees having put in their claim: at least sufficient appears to call on the plaintiff to shew that all his prior debts were discharged. 2dly, The answer to the plea set up in the replication, that *the defendant treated with the plaintiff as a person capable of credit*, is founded on what was said by *Buller* J. in *Fowler* v. *Down*: but as he also admits that the assignees may disaffirm the bankrupt's title to after-acquired property, and that "if they claim they shall succeed," it reverts to the original question of property. And all the authorities, taken together, shew that the bankrupt has only a qualified right

(*a*) 1 *Atk.* 330. (*b*) *Coup.* 569. (*c*) Ib. 814.
(*d*) 2 *Ves.* 716. (*e*) 1 *Stra.* 505.

to

to property acquired after his bankruptcy and before his certificate, that is, subject to the claim of his assignees, and as against all the world but them. *Ashley* v. *Kell*, (*a*) *Hopkins* v. *Dewar*, (*b*) *Laroche* v. *Wakeman*, (*c*) *Silk* v. *Osborn*, (*d*) *Evans* v. *Brown*, (*e*) and *Webb* v. *Fox*. (*f*) If there be any exception to the general rule, it is in favour of the exclusive claim of the bankrupt to his personal earnings, as it seems to have been considered in *Chippendale* v. *Tomlinson*; (*g*) though there was no [58] interference of the assignees, as in this case. There is, however, no allegation that the promissory notes in question were the earnings of the bankrupt's *personal* labour, which ought to have been pleaded if meant to be insisted on: though if they were, yet having been reduced into the shape of general property, they would at any rate become liable to the claim of his assignees.

Littledale contrà. The mere circumstance of becoming a bankrupt does not deprive a man of his property till an assignment of it under the bankrupt laws: the commissioners themselves have no property in the bankrupt's estate and effects, but only a power to assign them for the benefit of the creditors. The stat. 13 *Eliz. c.* 7. *s.* 2. directs the assignment to be by deed indented and inrolled to each of the creditors rateably in proportion to his debt: that applies to existing property at the time. Then the 11th section extends to his future estate and effects (where the debts remain unsatisfied) and directs that they shall "by the commissioners, &c. be bargained, sold, ex-"tended, delivered, and used for payment of the creditors *in* "*such like manner and form* as other the lands, &c. goods and "chattels of the bankrupts, which they had when they were "declared *first* to be bankrupts." Next, the stat. 1 *Jac.* 1. *c.* 15. *s.* 13. enables the commissioners to assign debts due, or *to be due*, to the bankrupt, to the use of the creditors. The stat. 5 *Ann. c.* 22. first directed the commissioners to assign the bankrupt's

(*a*) 2 *Str.* 1207. (*b*) *Bull. N. P.* 153. and *Ca. K. B.* 109.
(*c*) *Peake's N. P. Cas.* 140. (*d*) 4 *Esp. N. P. Cas.* 140.
(*e*) Ib. 170.
(*f*) 7 *Term Rep.* 391. and vide *Webb* v. *Ward*, ib. 297.
(*g*) *Tr.* 25 *G.* 3. *B. R. Cooke's Bankt. L.* 260. 1st. edit. In my MS. note of that case Mr. Justice *Buller* says that "the bankrupt had an undoubted right to sue for the profits of his labour; but supposing a person in his situation should gain a large sum of money or considerable effects, then such money or effects would undoubtedly be liable to his assignees."

property

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KITCHEN *against* BARTSCH.

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property to general assignees, which was followed by the stat. 5 *Geo.* 2. *c.* 30. *s.* 26. 30. making the like provision. And even since these statutes it has never been doubted but that there must be a new assignment of *future real* estate. Then what distinction is there between *real* and *personal* estate in this respect, since it is admitted that there must be an assignment of the latter in the first instance as well as of the former. With respect to wills where the distinction exists, it is founded on the statute of wills, (*a*) which only gives a power to devise lands which the party has at the time of making his will; the words of the statute being "*having* lands." But with respect to personal property, the will is ambulatory till the death: though perhaps the better reason is that the legatee claims under the executor, who has the legal estate in trust for him. [Ld. *Ellenborough* C. J. asked why *future* debts *to be due*, as well as debts due at the time to the bankrupt, might not pass by one deed, under the stat. 1 *Jac.* 1. *c.* 15. *s.* 13. which says "that the *same* grant (not grants,) assignment, or disposition of the said debts, in form aforesaid to be made by the said commissioners, shall vest the property," &c.] That only means that the *debts* might be assigned by the *same* instrument as the rest of the bankrupt's estate. [*Le Blanc* J. If the words will admit of two senses, does not the universal practice, not to make a separate assignment of future personal property, shew the sense in which they have been always understood since the passing of the act?] Here only existing debts were assigned, and not such as might *thereafter become due;* (to which it was answered that the assignment was in the common form.) In *Jacobson* v. *Williams*, (*b*) Ld. Chancellor *Cowper*, in answer to one objection that the assignment was made by the commissioners before the legacy in question had vested in the bankrupt's wife, seemed to consider that a new assignment would supply the defect; and Ld. C. J.

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Eyre's opinion in *Fowler* v. *Down* (*c*) is very strong as to the necessity of a new assignment. And the opinion of Ld. *Hardwicke* to the contrary in *Ex parte Proudfoot* (*d*) was not necessary; for the petition was dismissed. 2dly, The defendant having treated with the plaintiff as a person capable of credit, cannot now object to the want of his certificate, however the plaintiff may be answerable over to his assignees, or however the assignees

(*a*) 34 *H.* 8. *c.* 5. *s.* 1.
(*b*) 1 *P. Wms.* 383.
(*c*) 1 *Bos. & Pul.* 47.
(*d*) 1 *Atk.* 253.

might

might have sued the defendant. And the defendant might have avoided all difficulty by paying the money to the assignees. The cases of *Chippendale* v. *Tomlinson*, (*a*) and *Osborne* v. *Silk*, (*b*) establish the distinction, that the assignees have no claim upon the personal earnings of the bankrupt: and that the contracting party having treated with the bankrupt as a person of credit is precluded from objecting to the action by him for the value of his work and labour and materials furnished after the bankruptcy. Then if it were competent for the bankrupt to contract at all, the contract must be mutual, and the notice given by the assignees cannot vary it. Besides, the recovery of the money by the bankrupt is not inconsistent with the claim of the assignees, to whom he is accountable, and who may sue in his name.

Lord ELLENBOROUGH C. J. If this were a case in which we were called upon to decide for the first time upon a recent statute framed in the terms of the stat. 13 *Eliz. c.* 7. there would be strong ground for the argument that a second assignment of after-acquired personal property was as necessary as a second assignment to pass lands acquired by the bankrupt after his bankruptcy; which latter has always been the case. But the uniform tenor of the decisions has been that the general assignment of personal property by the commissioners in the first instance passes all the future acquired as well as present personal property of the bankrupt. And that opinion has always prevailed in practice, though perhaps the opinion obtained at first without duly weighing the words of the 11th section of the statute. But after so great a length of time, and such a mass of property conveyed in this manner, it would be too much now to say that all which has been done is erroneous, and to put a new construction upon the act: especially when the argument in support of the construction which has prevailed on the statute of *Elizabeth* has acquired force from the wording of the statute 1 *Jac.* 1. *c.* 15. *s.* 13. which directs that the commissioners shall have power to grant and assign all debts *due* or *to be due* to the bankrupt to the use of his creditors by *the same* grant, assignment, or disposition, &c. Now whether or not the practice of making but one assignment of personalty, including future as well as present acquired property, has grown up by adverting to this provision in the statute of *James*, as construing and controlling

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(*a*) Cook's B. L. 260. (*b*) 1 Esp. N. P. Cas. 140.

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the meaning of the statute of *Elizabeth*, I do not know; but certain it is that since the statute of *James* the opinions and practice have been uniformly one way: and it would now be highly dangerous to revert to a critical exposition of the words of the statute of *Elizabeth*. *Tudway* v. *Bourne* seems to be the only case where a second assignment of personalty is said to have been made: but nothing turned on that. And though some opinion on the subject was thrown out in *Jacobson* v. *Williams*, yet it was not made the ground of decision. I

[62] observe what is said by the Chief Justice in *Fowler* v. *Down*, which, if it were res integra, might have great weight: but it is not fit to enter too deeply into a critical disquisition upon the words of an act of parliament of long standing as if it had passed but yesterday, laying aside the experience and practice of centuries. And all the other Judges there agreed that if the assignees claimed, they were entitled to the property; and such also was the opinion of Lord *Kenyon* in *La Roche* v. *Wakeman*. Then, 2dly, it is contended that the objection cannot be set up by a third person, and *Chippendale* v. *Tomlinson* is referred to, as shewing that the bankrupt is entitled to the earnings of his personal labour; without which, it is said, he would be left to starve, which could not have been intended by the Legislature. The hardship of that case might perhaps have warped the opinion of the Judges, when the evil might have been better remedied by statute. There is now, however, an inveterate practice of above 20 years in support of that series of cases. But no question of that sort arises here. And with respect to the defendant's having given personal credit to the bankrupt, and thereby concluded himself from objecting to his want of property in the notes sought to be recovered, the answer is plain, that if I treat with a man upon the footing of his having property in a thing, and it afterwards turns out that he had none, the very foundation on which I treated with him fails. Then the assignees, whose property this is, have done every thing short of force to reclaim it: they have required the defendant to pay the money to them. Those, therefore, who are admitted by the general current of authorities to be competent to disaffirm the right of the bankrupt, have disaffirmed it by insisting upon their own claim.

[63] GROSE J. After the opinion of so able a Judge as Lord *Hardwicke* delivered in the case *Ex parte Proudfoot*, and the practice which has ever since subsisted, it would be removing land marks to doubt the power of the commissioners to assign the

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the future personal property of the bankrupt, as well as that which he had at the time of the bankruptcy. Then it is impossible, after the general assignment, for the bankrupt, who has never obtained his certificate, to recover this debt against the consent of his assignees, who have the legal right to it. And this doctrine has been confirmed by Lord *Mansfield* and Lord *Kenyon*.

LAWRENCE J. I am of the same opinion on both points. It is too late now to give a new construction to the statute of *Elizabeth*, different from what has always hitherto prevailed. And in all the modern cases where the action brought by the bankrupt against third persons has been sustained, it has been distinctly stated that the bankrupt can only recover where the assignees do not interfere: and here it is expressly stated that they do interfere, and require the defendant to pay the debt to them. Then if the plaintiff meant to insist that the assignees were suing in his name, that should, if material, have been replied.

LE BLANC J. All doubt upon this subject ought to be at rest. For whatever opinions may have been thrown out by different Chancellors or Judges, it has been long ago determined that no second assignment of personal property coming to a bankrupt is necessary. The only case where it ever appears to have been made is in the case of a legacy; and the general practice has been invariably otherwise, and it would be dangerous to shake it. Then, 2dly, all the cases admit that the superior title of the assignees must prevail where they come forward. Where interlocutory judgment has been recovered by one who afterwards becomes bankrupt the Court has always listened to the application of the assignees to proceed with the suit in the bankrupt's name. (*a*) So, on the other hand, in applications for costs; where an action has been brought by the assignees for their own benefit, in the bankrupt's name, the Court has required them to give security for the costs. (*b*) All that the Courts have said in any case is, that where the assignees do not interfere, one who has contracted with the bankrupt after his bankruptcy shall not protect himself on their account against the claim of the bankrupt: but that is in effect saying that if the assignees do claim adversely, the bankrupt shall not recover from the party that which is in law the property of the assignees and claimed by them.—Judgment for the Defendant.

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(*a*) Vide 2 *Tidd's Prac.* 811.

(*b*) Ib. et vide *Webb* v. *Ward*, 7 *Term Rep.* 296.

The

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Saturday, Nov. 23d.

The KING *against* The Hon. ROBT. JOHNSON.

The publisher of a Public Register receives an anonymous letter, tendering certain political information on *Irish* affairs, and requiring to know to whom his letters should be directed; to which an answer is returned in the Register; after which he receives two letters in the same hand-writing, directed as mentioned, and having the *Irish* post mark on the envelopes; which two letters were proved to be in the hand-writing of the defendant, the previous letter having been destroyed: this is a sufficient ground for the Court to have the letters read, and the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the Register in *Middlesex* for the purpose of publication, the whole is evidence sufficient for the jury to find a *publication* by the procurement of the defendant in *Middlesex*.

THE plea of the Defendant, one of the Judges of the Court of Common Pleas in *Ireland*, to the jurisdiction of this Court, having been over-ruled, (*a*) he pleaded not guilty to the indictment found by the grand jury of the county of *Middlesex*; which charged him with the publication in that county of certain libels upon the Administration of Government in *Ireland*, and amongst others upon the Lord Lieutenant and Lord High Chancellor of *Ireland*; and the trial was had on this day at the bar of the court by a jury of the county of *Middlesex*. In the course of the trial, the publication of the libels having been proved to be made in that county, by insertion of them in Mr. *Cobbett's Weekly Register*, which was printed and published in *Westminster*, the following evidence was given on the part of the crown to shew that such publication was made by the procurement of the defendant. Mr. *Cobbett*, the publisher of the Register, proved that before the publication of the libels in his paper, he had received an anonymous letter (the original of which he believed to be destroyed) *in the same hand writing* as the libels which he afterwards received; in which letter (parol evidence of which was admitted, after objection taken and over-ruled, to be given for this purpose) the writer enquired whether it would be agreeable to Mr. *Cobbett* to receive for publication in his Register certain information of public affairs in *Ireland*; and if it were, he was * desired to say to whom such information was to be directed. In consequence of the receipt of this letter, which was published in the Register, Mr. *Cobbett*, through the medium of the same Register, requested the promised information to be directed to Mr. *Budd*, No. 100, *Pall Mall*, whose shop was at that time used by Mr. *Cobbett* for the publication of his Register, where letters of communication were addressed to him, and from whence he received them; his own house being in *Duke-*

(*a*) Vide this case, upon demurrer to a plea to the jurisdiction of the Court, 6 *East*, 583 - 602.

street,

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street, Westminster. After this intimation Mr. *Cobbett* received in due time two several letters, containing different parts of the libels in question, both in the same hand-writing with the letter previously received. Both the letters came under cover, but the covers were believed to be either destroyed or lost, having been thrown aside as useless; and therefore parol evidence was admitted to prove that they had the *Irish* post-mark upon them, and were directed in the manner pointed out in the Register. The first of the letters, dated 29th of *October* 1803, was received and the cover opened by Mr. *Budd*, who thereupon sent it, together with the cover opened, to Mr. *Cobbett* in *Duke-street*, by a person in the office whom the witness did not recollect. But in consequence of his desiring Mr. *Budd* not to open any other letters so directed, Mr. *Cobbett* received the next letter, which came to Mr. *Budd* by a subsequent post, unopened. Several witnesses were then called, who, upon examination of the letters so received by Mr. *Cobbett*, swore to their belief of their being the hand-writing of the defendant, who at the period in question was an *Irish* Judge. It was then proposed by the *Attorney-General* that the letters containing the libels should be read, which he said contained internal evidence that they were written and sent by the writer to Mr. *Cobbett* for the purpose of being published in his Register. But previous to their being [67] read,

Adam, *Park*, *Lockhart*, and *Richardson*, objected to the reading of the libels, upon the ground that there was no evidence to go to the jury of a publication *by the defendant* in *Middlesex*. Admitting, for the sake of argument, that the letters were in the hand-writing of the defendant, there was no evidence that he had sent them into *Middlesex* to be there published; nor any privity established between him and *Cobbett* the publisher. It was not proved that the envelopes were in the defendant's hand-writing; but papers written by him and not intended for publication might have fallen into the hands of another, who transmitted them to *Cobbett*. The mere circumstance of the envelopes having the *Irish* post-mark upon them could not connect them with the defendant; who was not even proved to have been in *Ireland* at the time. Neither did it appear that the first letter, which was opened by *Budd*, who was not called as a witness, was really contained in the envelope which was sent opened with it. The second letter was indeed connected with the envelope,

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but there was no evidence that either of the papers was received from the Post-office, which might have been ascertained by persons employed in that office. If it were urged that the papers themselves contained internal evidence that they were intended for publication, the same might have been urged in the case of the Seven Bishops, where there was clear proof of a publication in *Middlesex;* for the petition which had been prepared and signed by them at *Lambeth* in the county of *Surry,*

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was found in the king's hands in *Middlesex,* (*a*) and was addressed to him: and the only link wanted was that it came there by the agency of the Bishops; (*b*) which was holden not to be supplied by the evidence of their acknowledgment of their hand-writing in that county: (*c*) in consequence of which Lord *Sunderland* was afterwards called to prove the delivery of it by the bishops to the king in *Middlesex.*

The *Attorney-General, Solicitor-General, Erskine, Garrow, Wood,* and *Abbott,* for the crown, were stopped by the Court.

Lord ELLENBOROUGH C. J. Nothing which falls from the Court will over-rule or tend to shake that which was foundly ruled in the case of the Seven Bishops, where the only evidence at first relied on was of a confession by the defendants, extorted as it was, of their having owned in *Middlesex,* their signatures to the petition which had been prepared and signed in the county of *Surry:* but there was no evidence of any publication of the libel, as it was then called, (though it was nothing more than a decent and humble petition of those reverend persons to the king,) in the county of *Middlesex,* until Lord *Sunderland* was called, who gave evidence of a publication of the paper in that county proper to be left to the jury. But here there is no question of the fact of publication by Mr. *Cobbett* in *Middlesex* of that which is admitted to be a libel: and the only question is, Whether the defendant were accessary to that publication? For if he were, the offence is established. For one who procures another to publish a libel is, no doubt, guilty of the publication, in what-

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ever county it is in fact published in consequence of his procurement. Now material evidence of the fact of such procurement may be collected from the papers themselves, as they have been opened by Mr. Attorney-General, which papers, as

(*a*) The case of the Seven Bishops, 4 *St. Tr.* 337.
(*b*) Ib. 344, 5.
(*c*) Ib. 345—9. 360—365.

the

the proof at present stands, are in the hand-writing of the defendant; and are said to answer the description of those which *Cobbett* had been previously desired to publish, and which papers came to his hands through the medium pointed out by him in his Register. How then can we be called upon to pronounce that there is no evidence to go to the jury of such procurement before we have heard read the papers themselves? I am therefore of opinion that we are bound in duty to receive the evidence.

GROSE J. concurred in the same opinion.

LAWRENCE J. The case of the Seven Bishops does not apply to the present. Before Lord *Sunderland* was called the only evidence against the defendants was of a confession by them in *Middlesex* of their hand-writing to a paper which was shewn them, which was stated to have been written in *Surry;* but that was no evidence of a publication by them in *Middlesex*. But here there is clear proof of a publication in *Middlesex* by *Cobbett*, and the only question is, Whether this were done by the procurement of the defendant? Then after it has been proved by the witness that he received a notification by letter that he should have papers of a certain description sent to him to publish, if he would undertake to publish them, to which he had given a public answer in his Register in the affirmative, directing to whom the papers should be sent; and when afterwards, in consequence of that communication, he receives papers through [70] the channel pointed out by him, papers which are proved to be in the hand-writing of the defendant, (as it stands at present,) and answering, as they are said to do, the description of those before notified to him as intended for publication, must not the papers themselves be read? and is there not evidence to go to the jury for them to decide whether the papers were sent by the defendant or by some other person?

LE BLANC J. delivered his opinion to the same effect; and added, in answer to the objection that there was not strict evidence of a delivery of the letters by the post to Mr. *Cobbett*, that it was not material for the decision of the present question, how the letters came to Mr. *Cobbett*, whether by the post or a private hand; that was matter of observation to make to the jury.

The libels were then read at length, and in addition to the libellous matter charged, contained various expressions declara-

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tive of the author's intention to have them published in the Register: and the latter paper contained an acknowledgment of the publication of the former part of the correspondence.

The defendant afterwards called witnesses to disprove the hand-writing, and went to the jury upon the fact that the libels were not in his hand-writing: but after a trial of some length the jury found a general verdict of guilty

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Monday, Nov. 25th.

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The KING *against* The Commissioners of Sewers for the County of SOMERSET.

By stat. 23 *H.* 8. *c.* 5. the jury, by whom a presentment is made to commissioners of sewers concerning what lands are within a level and subject to a certain rate, ought to be summoned by the sheriff *from the body of the county* in pursuance of a precept directed to him from the commissioners for that purpose. And a

UPON a rule to shew cause why certain presentments and other proceedings had before these Commissioners, and which were returned by certiorari into this Court, should not be quashed for illegality and improper practices, it appeared that in *Easter* term 43 *Geo.* 3. a mandamus had issued to the commissioners to make a rate on the owners of lands, &c. within the level of *Huntspill* in the county of *Somerset* which might have loss by inundations of the sea for want of a sufficient sea-wall there, or be benefited by such wall, for repaying to *B.* and others certain sums advanced by them to *R. S.* the collector appointed by a decree of the commissioners in *June* 1799, for the purpose of making a sufficient wall there; and which decree directed the money so advanced to be re-imbursed by a rate made on the level. In consequence of this mandamus, and of attachments obtained against the commissioners in *Hilary* term 1804, the execution of which was suspended, the commissioners, on the 20th of *April*, 1804, issued a

presentment made by a *standing jury*, constituted according to ancient usage, originally returned by the sheriff, at the commencement of every new commission of sewers, *from certain parishes or districts*, composed of land owners there, interested in disclaiming the general charges of the level, which jurymen acted for life, unless removed for cause, and only the *foreman* of whom was summoned by the sheriff on the particular occasion, which foreman thereupon convened the other jurymen, is illegal and void: and the want of jurisdiction of such presenting jury cannot be waved by traversing their presentment and going to trial before another jury properly returned from the body of the county, by whom such presentment was confirmed. The presenting jury, after being sworn and charged, must also prosecute their enquiry upon hearing evidence on oath before the commissioners *in curiâ*, and make their presentment thereon, and not upon information collected *in pais*, without oath.

precept

precept under their hands and seals to the sheriff of the county, directing him to issue his warrants, and cause to be summoned *the foremen* of the several *juries* of *Huntspill, Burnham*, &c. *Pureton*, and *Paulett*, to appear before the commissioners at a session of sewers at *Bridgewater* on the 4th of *May* 1804, to receive their charge and instructions for returning correct lists of all the occupiers of lands, &c. within their respective views, lying within the level of *Huntspill*. In consequence of which precept the sheriff issued his warrant to the clerk of the sewers to summon in his name *the foremen* of the several juries, who were summoned accordingly. It appeared from the affidavits of the clerk to the commissioners and of other persons, (made in support of the presentments after mentioned,) that the mode of forming juries, as far back as living testimony went, and the records of proceedings before the commissioners of sewers for the county could be traced, and immemorially as they believed, was this; on the issuing of any new commission of sewers the commissioners issued their precept to the sheriff of the county to summon juries for the different parishes or districts in the county, who, upon their appearing at the next court of sewers appointed for that purpose, nominated one out of each set of jurors so returned as their foreman. That the jurymen so named had always consisted of persons residing in or near the parish or district where their views had immemorially been made, as persons having the best local knowledge and information of the subjects of their presentments, and were more or less numerous according to the extent of their several views, which were well known; and that the foreman (*a*) and other jurymen were sworn by the commissioners to enquire and present all defaults, impediments, and annoyances, &c. within their view, and all such other matters as they ought to present as long as they continued in office. That in no instance was it known that any of the juries had intermeddled with each other's views.

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(*a*) The foreman's oath was as follows; "You, as foreman of —— jury of sewers, shall swear that you, together with your jury, shall diligently inquire, and at all sessions of sewers whereunto you are lawfully summoned a true presentment make, of all impediments, defaults, and annoyances of or by water found within your view, as also of all other matters and things which you as foreman of the said jury ought to present, according to the best of your knowledge and judgment, and as long as you shall continue in the office, without any concealment." The juryman's oath was the same, mutatis mutandis.

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That every juryman so returned and sworn generally continued for life, unless discharged by the commissioners for good cause, in which case some other fit person was sworn into the jury in like manner: but that it was not usual to re-swear them except only when a new foreman was chosen. But in the instances of the presentments of the *Huntspill* jury, and of the *Burnham*, *Paulett*, and other parish juries after mentioned, it appeared that the usual mode had been so far departed from, that the juries making those presentment had been previously re-sworn in court. That when such presentments have been traversed, then the practice has been to issue a precept to the sheriff to summon a jury to try the traverse from other parts of the county at large than those within the level in question. It further appeared that in pursuance of the above mentioned summonses the standing jury (*a*) of sewers for the parish of *Huntspill* attended a court of sewers at *Bridgewater;* and on the 20th of *May* 1804 received a charge from the Court to make a return of persons and lands within that part of the level of *Huntspill* which lay in the parish of *Huntspill*, receiving benefit or avoiding damage by reason of the wall which had been erected; that they were to do this with the assistance of *C. C.* the surveyor of the level appointed by the decree, and were to hear evidence as to the quantity and value of each person's property so situated, and present
[74] a list of the same accordingly. The said jury attended again at an adjourned court on the 9th of *June*, when *C. C.* their surveyor being sworn, gave in a list of the persons and property within the parish of *Huntspill* liable to be assessed, which list was then adopted by the jury, and a presentment made and signed by them accordingly. At the next court, holden by adjournment on the 13th of *July*, the standing juries for the parishes of *Paulett* and *Pureton* severally received the like charge; and on the 27th of *July*, at another adjourned court, the surveyor being sworn, delivered in similar lists of the persons and lands in their respective parishes which would be liable to damage if the new sea-wall did not exist in the parish of *Huntspill;* but before his evidence was closed the standing jury for the parish of *Paulett* delivered in a presentment which had been previously prepared and signed, finding in substance that *no person or land within their parish would be damaged by inundations of the sea for want of the*

(*a*) It was the practice for the foreman when summoned to convene the other jurymen to attend.

said

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said wall, nor receive benefit by its erection. And the *Pureton* jury then made a similar presentment. The *Paulett* and *Pureton* presentments were traversed at a court holden on the 31st of *August;* and at another court holden on the 6th of *October* following those traverses were severally tried before juries *summoned from the body of the county by the sheriff*, in consequence of a precept directed to him by the commissioners for that purpose; and they after hearing evidence on both sides, found verdicts in support of the respective presentments. The affidavits of the prosecutors alleged that most, if not all of the persons composing the standing juries for the several parishes were interested in negativing the liability of their parishes to the expence and support of the sea-wall in question, being owners of land, &c. within the same on whom the expence would fall: and further [75] charged several of the jurymen with having combined to make their returns. And then stated that they had applied to the commissioners to summon a jury *from the body of the county* for the purpose of making the presentments in order to the making of a rate; that the commissioners issued their precept to the sheriff accordingly; who returned a jury to a court of sewers holden at *Bridgewater* on the 20th of *October;* but the commissioners then attending told the jury *that the court had been advised that they had no right to employ them to make a return of lands in the level,* and thereupon dismissed them; and then ordered a precept to be issued to the sheriff to summon the *standing* juries for *Burnham* and the other parishes within the level to attend the court on the 9th of *November* 1804, on which day the respective juries attended, and being sworn, were charged to return all persons having lands, &c. in the level of *Huntspill* within their several views which had or might have benefit by preventing the inundation, &c. Each of these juries returned at an adjourned court holden on the 23d of *November*, that no person, &c. within their different parishes would be benefited by the sea-wall in question; and these presentments also, which were made without hearing evidence, though tendered, were alleged by the prosecutors to have been made through the like combination and interested motives, and by owners or occupiers of lands within the respective parishes; and circumstances were adduced to shew that they had been previously prepared. At the same court about 60 traverses of the *Huntspill* presentment were entered, some of them in names of jurymen who had signed the other presentments; and it was alleged that

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meetings had been holden by advertisement, and subscriptions *entered into by jurymen and others who had taken part in the proceedings for opposing the making and levying of the proposed rate. The affidavits in support of the presentments, in addition to the usage before mentioned, which had always prevailed, respecting the mode of summoning the presenting juries, alleged that the sea-wall in dispute in the parish of *Huntspill* had immemorially been repaired by the owners of certain lands lying in that parish, who had let it fall to decay; and denied the necessity of the new works lately made to the same, and the benefit thereof to the parishes newly charged. And the affidavits of certain jurymen went to deny combination in themselves, or in others to their knowledge. The commissioners, defendants, also made affidavits, exculpating themselves from any intentional errors, and from all knowledge of improper practices in others; and submitting to act as the court should think proper to direct: and with respect to the dismissal of the jury summoned by the sheriff to attend before them on the 20th of *October*, 1804, they answered that they had so done, because it appeared to them to be expected that the jurors so returned should be required to view all the lands in the level of *Huntspill*, and to assess such as were liable to contribute to the expence of repairing the said sea-wall; and that they had been advised that no instance had occurred of a jury having been impannelled and sworn for such a purpose, and that they had no power to compel the jury so to act.

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Trip appeared for the commissioners; and after adverting to their exculpatory affidavits, which acquitted them of any intentional error, admitted that the whole proceedings had been founded in mistake. He stated that commissioners of sewers were by law to proceed by view, (*a*) survey, (*b*) and presentment. (*c*) They themselves were to view, and they were to appoint surveyors and other competent persons to go throughout and survey the level, and point out all defaults and obstructions proper to be remedied and removed; and in case of omission by the party complained of, the commissioners ought to summon an indifferent jury *from the body of the county* to hear the charge and defence by proper evidence upon oath, who were thereupon to make their presentment accordingly. Instead of which the pre-

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(*a*) Vide *Callis* on Sewers, 105, 6. (*b*) Ib. 106, 7. (*c*) Ib. 103.

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sentments in question had been made by what were called *standing juries*, composed of persons having lands in the very district sought to be burthened, and consequently directly interested in the questions submitted to them; and these had mistaken their functions, and taken upon themselves to determine what lands were within the level.

The Court were all clearly of opinion that the presentments made by juries of the description mentioned could not be supported: and wished not to be called upon to give any opinion upon the criminatory parts of the affidavits in support of the rule: but suggested that if there were any doubt whether such or such lands were within the level, it might best be tried upon issues, if the parties could agree upon them. It was however proposed by the counsel in support of the rule to leave the whole matter to arbitration, and the case stood over for a few days in order to obtain the consent of the other parties. But the proposal not being then acceded to,

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Pell, *Peake*, and *Moore* shewed cause against the rule, and endeavoured to support the presentments of the *Paulett* and *Pureton* juries, by referring to the usage which had at all times prevailed in that part of the county of having *standing juries*, as they are called, to make presentments to the commissioners of sewers, within certain known limits. Commission of sewers, they observed, existed before (*a*) the stat. 23 *H.* 8. c. 5. which gave them their present form; for the statute itself refers to proceedings before it was passed, and the usage was probably antecedent to the statute. The presentments do not conclude the rights of the parties, but merely serve as charges or exonerations to put the matters disputed in a course of trial; the objection, therefore, of interest in the jurors making the presentments is not so material as to vitiate a long established usage; especially when it is considered that they who have lands within the reach of the mischief are most interested in guarding themselves as well as others against it. The jurors are in the first instance returned by virtue of a precept issued to the sheriff to summon them; and there is this advantage derived from such a usage, that the persons so selected must, from their local knowledge, have better opportunities of informing themselves of nuisances affecting their district. In a case in *Styles*, (*b*) one of the exceptions taken to a presentment, on which it was quashed, was

(*a*) Vide *Callis* on Sewers, 24. which refers to *Fitz*, *Na. Br.* 113.

(*b*) 165. 191, 2, referred to in *Callis*, 110.

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that "it did not appear that the breach was *within the hundreds whence the jury came;* and so they had no authority to enquire:" which shews at least that the locality of the presenting jury was not considered as any objection under the stat. of * *Hen.* 8th: and in other books (*a*) it is said that the ancient practice and usage of the commission of sewers ought to be upholden. The presenting juries are charged at one court to enquire, and at the next court, being re-sworn, they make their presentments; and such presentments are traversable; and whatever objection might have been made to them in the first instance, it has been waved by the parties having actually traversed them, and gone to trial before a jury summoned by the sheriff from the body of the county, against whom there is no objection: and by whom the presentments of the standing juries have been confirmed.

The *Solicitor-General*, *Burrough*, and *Newbolt*, in support of the rule, were stopped by the Court.

Lord ELLENBOROUGH C. J. I should be sorry to be pressed to give any opinion upon any other parts of the case than the mere legality of the proceeding: how it happened that a legal jury, summoned by the sheriff from the body of the county, were dismissed, and other vicious juries subsisted in their place, the jurymen of which vicious juries are also charged with having entered into a previous combination to make certain presentments, I shall not at present enquire: but any thing more alien from judicial proceedings than these I never saw. There may be some use in the standing juries for the purpose of advising and assisting the commissioners in their enquiries; but not as juries to make presentments, being themselves also interested in the subject-matters of their presentments. In the first place, *the juries* were not summoned by the sheriff: the precept from

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the commissioners to the sheriff was to summon *the foremen* of the juries, and the return of the sheriff is that he has returned *the foremen;* there is no return of the jurymen themselves. That therefore, is not pursuant to the act of parliament; which, at any rate, requires the presentment to be made by a disinterested jury returned by the sheriff, and not by a body aliene altogether to the jurisdiction. In the case referred to from *Styles* there was no question but that the jury was to be returned by the sheriff. Then if there be a want of jurisdiction, it may be

(*a*) *Moor*, 825. *pl.* 1115. and 19. *Vin. Abr.* Sewers, 418.

taken

taken advantage of at any time, after verdict, as well as before: and no consent of parties can give jurisdiction where none is given by law. Then again, after the juries so summoned had met, instead of prosecuting their inquiries before the commissioners, by hearing evidence legally laid before them on oath, they were sent out, as it seems, to prosecute their inquiries all about the country, and upon information so picked up, they were afterwards to make their presentments. But this is not a judicial method of making the inquiry; the jury ought to be sworn before the commissioners, before whom also the inquiry is to be conducted, by evidence delivered upon oath, upon hearing which the jury are to make their presentment. The whole proceeding therefore is irregular.

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The other Judges concurred in directing the presentments and other proceedings complained of to be quashed.

RANDALL *against* RANDALL.

Monday, Nov. 25th.

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Upon a reference of all actions, controversies, &c. and also of two distinct matters of difference; if the arbitrator omit to decide one of such distinct matters, that vitiates the whole award; which cannot therefore be enforced by attachment.

UPON a rule to shew cause why an attachment should not issue against the Plaintiff for non-payment of 20*l.* 19*s.* 8*d.* a sum awarded against him; it appeared that the parties by their several bonds of submission referred to certain arbitrators to determine "all actions and controversies, &c. depending between them; and *also* of and concerning the value to be put on the *hop-poles* and potatoes in certain land (described in the award as land *first* therein after mentioned,) and the workmanship done thereto and taxes and rates paid in respect thereof by the Defendant; and *also* concerning the *rent* to be paid annually by the plaintiff to the defendant for the land, (described in the award as *secondly* after mentioned), together with the costs, &c. so as the said award were made in writing and ready to be delivered to the parties on or before the 12th of *May*." Then the arbitrators by their award, after reciting the above, and that they had accepted the reference: and that the parties had delivered to them an account in writing respecting the matters referred as aforesaid, and that they had heard the parties and examined such witnesses as they had thought necessary, touching the matters referred as aforesaid, and had duly considered *all* matters and things referred to them, found the value of the hop-

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hop-poles and potatoes in the grounds mentioned to be 154*l.*, and the balance due from the plaintiff to the defendant (including that sum in the account) to be 20*l.* 19*s.* 8*d.*, which they therefore awarded to be paid, and the costs, &c. to be equally divided; but they did not notice nor make any award concerning the *rent* to be paid annually by the plaintiff to the defendant for the land. Wherefore it was objected by

Comyn, on shewing cause against the attachment, that the award was bad upon the face of it, and could not be enforced. For that where several distinct matters are referred to arbitration, if it do not appear that the arbitrator has determined each of them, the award is void for the whole: and here the words, "*so as* the *said award* be made, &c. on or before the 12th of *May*," makes the submission conditional, that the award shall include *all* the matters referred. Though if the reference be of *all* matters in difference, and the award be de præmissis, generally, it shall be intended that the arbitrator determined all the matters submitted to him, unless the contrary be shewn; and he cited 1 *Roll. Abr.* 256. *Arbitrament*, L. *Risden* v. *Inglet*, *Cro. Jac.* 838. *Middleton* v. *Weeks*, *Cro. Jac.* 200. *Bradford* v. *Bryan*, *Willes*, 268. and *Baspole's* case, 8 *Co.* 98.

Espinasse, in support of the rule for the attachment, contended for the sufficiency of the award, so far as the arbitrators had determined the several matters mentioned. He observed that the reference was not merely of such matters only, but of *all* actions, controversies, &c.; and the arbitrators upon the whole have found a balance of account in favour of the defendant to the amount of 20*l.* 19*s.* 8*d.* The Court then will presume that the arbitrators did decide on every matter, which was brought before them, unless the contrary were shewn by affidavit. And it is even said in *Baspole's* case, that though there be many matters in controversy, yet if one only be signified to

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the arbitrator, he may make an award of that: for he is to determine secundum allegata *et probata*; and it is in every day's practice that an award may be good in part and bad in part.

Lord ELLENBOROUGH C. J. That is where it does not appear that there is any notice to the arbitrator upon the face of the submission that there is any other matter referred to him than those which are mentioned to him at the time of the reference. But here it does expressly appear that there was another matter referred,

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RANDALL *against* RANDALL.

referred, on which there is no arbitrament. The arbitrators had three things submitted to them; one was to determine all actions, &c. between the parties; another was to settle what was to be paid by the defendant for the hop-poles and potatoes in certain land; the third was to ascertain what rent was to be paid by the plaintiff to the defendant for certain other land. The authority given to the arbitrators was conditional, *ita quod*, they should arbitrate upon these matters by a certain day. If then they fail as to one of them, the condition has not been performed upon which the award was to have its obligatory effect: and here they have stopped short, and have omitted to settle one of the subjects of difference which was stipulated for. This is not like the case where an award, being good in part and bad in part, the good part shall not be vitiated by the arbitrator having also directed something to be done which is superfluous and bad. But here the very condition on which the parties submitted to the award has failed.

LAWRENCE J. I did not know whether there might not have been some modern decisions, which had given a more liberal construction in support of awards, where the arbitrators, having distinct matters submitted to them, had made their award upon some of them only, omitting the mention of others: but as none such have been referred to, there seems to be no answer to the cases cited against this award, which shew that the arbitrators have not pursued their authority, not having performed the condition on which it was delegated to them. [84]

LE BLANC J. The contract of the parties is in effect this: one says that he will submit to the arbitrators to ascertain what he is to pay for the hop-poles, &c. upon condition that it shall also be referred to them to decide what rent is to be paid for certain land. And he may fairly have said that unless both those matters of difference were referred, he would not refer either of them singly. If then the arbitrators omit to decide one of them, the condition fails on which the reference was agreed to.

Rule for the Attachment discharged.

1805.

Tuesday, Nov. 26th.

The KING *against* The Bailiffs of IPSWICH.

The stat. 2 *G.* 2. *c.* 22. and other acts of the same class, making general provisions for the relief of insolvent debtors, charged in execution on process issuing out of *any of the courts of law*, extend to *inferior* as well as *superior* jurisdictions. But the application in both instances must be made before the end of the next *term* after the prisoner is charged in execution; except he can shew that his neglect arose from ignorance or mistake.

THIS came on upon a rule calling on the Defendants to shew cause why a writ of mandamus should not issue to them to make an order to cause one *Robt. Arnold*,* a prisoner in execution, in the common gaol of *Ipswich*, to be brought up to a court of Small Pleas to be holden for the town and borough, to take the benefit of the Insolvent Debtor's Acts. It appeared that *Arnold* was charged in execution for 18*l.* in the custody of the keeper of the common gaol there on the 17th of *December* last, at the suit of one *Booth*, upon process issuing out of the said court, which is a court of law and record holden before the bailiffs, and proceeding by capias ad respondendum to final judgment and execution. That through ignorance and mistake, arising from misinformation as to the power of that court to discharge insolvent debtors, he had neglected to give the necessary notices and take the requisite steps towards procuring his discharge, till a court of Small Pleas, holden on the 7th of *October* last; when that Court upon hearing the objections of the Plaintiff, were of opinion that they had no jurisdiction to discharge the prisoner; conceiving that the statutes for relief of insolvent debtors applied only to prisoners charged in execution upon process issuing from the superior courts; and therefore refused to make any order for bringing him up to take the benefit of the acts. And the questions now were, first, Whether an insolvent debtor in execution under process sued out of an inferior court were entitled to the benefit of the several acts passed for the relief of insolvent debtors? And if he were, 2dly, Whether this party were in time to apply for his discharge?

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Alderson shewed cause; and stated the ground on which the magistrates considered that they had no jurisdiction to discharge the prisoner to be, that the several general acts of parliament for the relief of insolvent debtors were confined to prisoners charged in execution on process originally sued out of one of the courts of *Westminster*, or who had been removed thither by habeas corpus and continued charged in execution in one of the prisons of the same courts; which appeared as well from the express mention of the courts of *Westminster* in some of the clauses, as by references in others to the *terms* by which those courts alone are regulated in their proceedings. The st. 2 *Geo.* 2. *c.* 22.

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c. 22. *s.* 8. enables prisoners charged in execution for debt not exceeding 100*l.* to petition any of *the courts of law from whence the process issued* for their discharge on the conditions therein mentioned: and the Court petitioned is required by order or *rule of Court* to cause the prisoner to be brought up accordingly. Then the st. 3 *Geo.* 2. *c.* 27. reciting the former act, and that it was found inconvenient to bring prisoners up from prisons at a distance *to the courts in* Westminster-hall *as that act directs*, enacts that after the first day of *Trinity term* then next, before any prisoner (except in *London*, *Westminster*, and *Southwark*,) shall petition any of *the courts in* Westminster-hall *from whence the process issued on which he was charged in execution*, he shall give notice to his creditors, at whose suit he was in execution, &c. and the Court may make a rule for him to be brought up at the next assizes holden for the place where he is imprisoned. These acts were continued or revived by st. 8 *Geo.* 2. *c.* 24., 14 *Geo.* 2. *c.* 34., 21 *Geo.* 2. *c.* 33., 29 *Geo.* 2. *c.* 28., and 32 *Geo.* 2. *c.* 28. (*a*) By *s.* 13. of the latter, "If any person or persons "shall be charged in execution for any sum not exceeding "100*l.*," and shall be minded to deliver up his estate and effects to his creditors, "it shall be lawful for any such prisoner, "before the end of the first *term* next after he shall be charged [87] "in execution to petition *any court of law from whence the pro-* "*cess issued* upon which he was so taken and charged in execu- "tion, or the court into which he shall be removed by *habeas* "*corpus*, or shall be charged in custody, and shall remain in the "prison thereof," certifying the causes of his imprisonment, and giving a true account of his real and personal estate, and giving notice thereof to his creditors: and if such Court shall be satisfied, the petition shall be received, and they shall give a day to the parties by order or *rule of Court* to appear personally before them, when the matter of the petition shall be examined in a summary way; and on oath made by the prisoner of his estate and effects, and assignment thereof made by him to his creditors, the Court may discharge the prisoner. But in case any creditor at whose suit he was charged in execution be dissatisfied, the Court may remand the prisoner, and direct him and the dissatisfied creditor to attend on some other day, "some "time at furthest within the first week of the *term* next follow-

(*a*) Vide 2 *Burr.* 747. 799. and 901.

"ing,

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The KING *against* The Bailiffs of IPSWICH.

"ing, &c., but sooner if any court shall so think fit:" after which the Court may discharge the prisoner, unless the creditor shall agree to pay him 2*s.* 4*d.* a-week so long as he shall be continued in execution. But if failure shall be made in the weekly payments, "such prisoner, upon application in *term* "*time* to the Court where the suit in which he shall be charged "in execution was commenced, or shall have been carried on, "or in the prison of which court he shall stand committed on "any *habeas corpus*, or *in vacation time to any judge of such* "*court*, may, by order of any such Court or Judge, be dis- "charged," &c. It is plain from the terms of this clause, that
[88] it was only intended to refer to prisoners charged in execution by process out of the superior courts, or who were removed into the prisons of such courts by habeas corpus: and by comparing it with the 15th section, it appears to have been intended to be confined to prisoners in prisons within 20 miles of *Westminster-hall;* for the 15th section directs that prisoners "charged in execution in any county gaol or in any other gaol "or prison *above* 20 *miles from* Westminster-hall, or *the Court* "*out of which the execution shall be issued*, &c. or in the prison "of which court any such prisoner shall stand charged in execu- "tion," shall proceed in like form and manner; and *such court* may make a rule for bringing him up *to the next assizes*, &c. On the other hand, the 16th section, which is compulsory on a prisoner to make a disclosure of his estate and effects on the application of a creditor, is relied on as extending in terms to *other courts of record* than the courts in *Westminster-hall;* but in that, as in the 11th section, for punishing extortion in gaolers, where the Legislature meant to include inferior jurisdictions, they have said so in terms: whereas having used terms in the 13th section which can only apply to the superior courts, they as plainly evince their intention to exclude all others. And a prisoner in execution under the process of an inferior court is not without remedy, as he may remove himself by habeas corpus into the prison of a superior court. He concluded by stating the readiness of the defendants to receive the application if the Court thought they had the jurisdiction.

Lord ELLENBOROUGH C. J. asked the prisoner's counsel
[89] whether the application were at any rate in time, supposing the prisoner had been in custody under the process of a superior court?

Wilson

1805.

The KING *against* The Bailiffs of IPSWICH.

Wilson and *Pooley*, in support of the application, referred to the st. 33 *Geo.* 3. *c.* 5. which extends the same relief to debtors for any sum not exceeding 300*l.*; the 5th section of which enacts, "that where any such debtor shall neglect to take the "benefit of the stat. 32 *G.* 2. *c.* 28., or of that act within *the* "*time* limited by that or this act, and shall make it appear to "the Court out of which such execution issued that such ne- "glect arose from ignorance or mistake, such debtor shall be "entitled to the benefit of the acts," &c. (*a*) They were then stopped by the Court.

Lord ELLENBOROUGH C. J. If there be any question upon the sufficiency of the excuse for the delay in not having made the application of relief in time, that must be decided by the Court below upon hearing the ground alleged for the delay. Upon the general question, I observe that the words of the stat. 2 *Geo.* 2. *c.* 22. are general, enabling prisoners charged in execution for debts not exceeding a certain amount to petition *any of the courts of law from whence the process issued* to be discharged, This is not contravened by any general provision of the 3 *G.* 2. *c.* 27. The st. 8 *Geo.* 2. *c.* 24. *s.* 2., for the first time introduces the word *term*, as coupled with the general permission given to prisoners to petition *any of the courts of law from whence the process issued;* and that requires the petition to be exhibited "before the end of the *term* next after such person shall be [90] "charged in execution;" a limitation which is extraordinary enough if meant to be applied to inferior jurisdictions, whose proceedings are not regulated by *terms*. But there are other provisions in other acts of parliament upon the same subject, which, it is admitted, must include inferior courts. Then in favour of so beneficial a remedy for the subject we will construe all these acts together, as forming one system of laws, extending to inferior as well as to the superior courts; limiting, however the application of the prisoner for relief to be made to the court, whether of superior or inferior jurisdiction, out of which the process issues, within the *term* next after he was charged in execution: the st. 8 *Geo.* 2. using the word *term*, in regard to inferior courts, as if it had required the application to be made within the next three months, or any other given time; the duration of the terms being of general notoriety. Therefore let the Court below receive the application, and hear what ex-

(*a*) Vide *Pearce* v. *Taylor*, 4 *Term Rep.* 231, which arose upon a similar clause in 26 *G.* 3. *c.* 44.; but both these acts were temporary.

1805.

The KING *against* The Bailiffs of IPSWICH.

cuse is alleged by the prisoner for not coming in time, and if he should appear to entitle himself to receive the benefit of the act, let them give it to him.

Per Curiam, Rule absolute.

Thursday, *Nov.* 28th.

[91]

Mandamus to the Quarter Sessions to inquire and give the benefit of the insolvent debtors' act to a prisoner, if he were entitled to it, denied, where it appeared that he was in execution on the 1st of *January* 1804 for a larger sum than the act extended to; though part of such sum were composed of a debt upon a judgment recovered, which the judgment creditor had an election given to him by the Lord Chancellor to prove under the commission by a future day, not arrived; but which it was stated that he had elected so to prove, and to abandon his judgment before the 1st of *January* 1804, though the prisoner was not discharged by a judge's order from such execution till long after that day.

Ex parte JOHN KING, a Bankrupt.

THE insolvent debtor's act of the 44 *Geo.* 3. *c.* 108., after requiring all gaolers to make out lists of prisoners, who upon the 1st of *January* 1804, or since, and at the time of making out such lists were in their custody for debt, &c. enacts, (sect. 4.) "that every person who on the 1st of *January* 1804 was "charged in any prison for the non-payment of debts, &c. "which did not on the whole amount to a greater sum than "1500*l.*, and whose name shall be inserted in any such list to "be delivered in as aforesaid, taking the oaths thereby directed "to be taken, and performing what on his part is required to "be done, shall be discharged," &c. In *April* 1802, a commission of bankrupt was taken out against *John King*; and in *Trinity* term 1802 *Pollard* and Co. recovered judgment against the bankrupt, for a debt due before the bankruptcy, and he was thereupon taken in execution for 1152*l.*, the debt and costs: after which *Pollard* and Co. petitioned the Lord Chancellor to be let in to prove their debt under the commission: and on the 7th of *April* 1803 the Lord Chancellor made an order, allowing them time till the first dividend were made to make their election whether they would proceed at law or under the commission. The bankrupt now stated in his affidavit that *Pollard* and Co. elected to prove their debt under the commission on the 12th of *December* 1803, (which was long before any dividend made) and signed his * certificate, (*a*) but he

Mandamus to commissioners of bankrupt to certify the bankrupt's conformity to the Lord Chancellor refused.

*[92]

(*a*) The majority of the commissioners, however, refused to certify to the Lord Chancellor the bankrupt's conformity to the acts; and after an unsuccessful application to the Lord Chancellor for this purpose, *Ploaden* applied in this term, on behalf of the bankrupt, for a mandamus to the commissioners to sign such certificate, upon a long affidavit setting forth many special circumstances. But the Court were of opinion that the Legislature had vested a discretion in the commissioners to judge of the bankrupt's conformity or

1805.

Ex parte JOHN KING.

he was not discharged out of execution at their suit till the 23d of *January* 1805, when a Judge's order was obtained for that purpose. And on the 1st of *January* 1804 the bankrupt stood charged in the warden's books for debts to the amount of about 2300*l.*, including the 1152*l.* due to *Pollard* and Co., which without the latter sum would have entitled him to the benefit of the insolvent debtor's act. But the Quarter Sessions in *London*, to which he had applied for that purpose, were of opinion, that as he stood charged in the warden's books for more than 1500*l.* on the 1st of *January* 1804, they had no jurisdiction to give him the benefit of the act.

Erskine therefore now applied for a mandamus to the Lord Mayor, &c. to inquire whether the bankrupt were in custody on the 1st of *January* 1804 for a larger sum than 1500*l.*; and if not, then to inquire whether he were otherwise entitled to his discharge under the insolvent debtor's act. And he urged that *Pollard* and Co. the creditors might wave the advantage which the Lord Chancellor's order gave them of waiting till the first dividend before they made their election; and that if it appeared [93] to the Court of Quarter Sessions that they did elect to prove their debt under the commission before the 1st of *January* 1804, then the bankrupt was not legally in custody at their suit on that day; their legal debt being then discharged; the same, for this purpose, as if it had been actually paid, though the formal discharge of his person from execution at their suit was not obtained till afterwards: the legal discharge however would have relation back to the time of the election made.

Lord ELLENBOROUGH C. J. Unless there were such a case made, as we could plainly see that the debt with which the prisoner stood charged on the 1st of *January* 1804 was unfounded and false, we cannot extend the benefit of the act to him. But on the contrary it appears, that long after that time he was actually indebted in, and stood charged in execution for a larger sum than that limited for the relief of the act: and therefore it would be nugatory to grant the writ prayed for.

Per Curiam, Rule refused.

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or nonconformity with which discretion they could not interfere; and therefore refused the writ.

1805.

Thursday, Nov. 28th.

BRADSHAW *against* SADDINGTON.

An affidavit to hold to bail, stating that the defendant was "justly indebted to the plaintiff in 100*l.* upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid," is sufficient without stating in what character the bill was due to the plaintiff, whether as payee or indorsee.

AN affidavit to hold the Defendant to bail stated that he was "justly and truly indebted to the Plaintiff in the sum of 100*l.* and upwards upon and by virtue of a certain bill of exchange drawn by the said defendant, and long since due and unpaid." For the insufficiency of which

Lawes obtained a rule nisi to discharge the defendant out of custody on filing common bail; because it was not stated in what character, whether as payee or indorsee, the plaintiff charged the defendant to be indebted to him; so that no privity appeared between the plaintiff and the bill, which he said was as necessary to be stated, as in any case to shew on what account the defendant became indebted to the plaintiff; and that it was usual for affidavits to hold to bail on bills of exchange to state that the plaintiff was *payee* or *indorsee*, &c.

Epinasse shewed cause, and observed that the affidavit stated the bill to have been *drawn* by the defendant, and therefore he could only be indebted to the plaintiff *upon it* as payee or indorsee. That in *Coppinger* v. *Beaton* (*a*) it was holden sufficient for the affidavit to state that the defendant was indebted to the plaintiff in such a sum "for money had and received on account of the plaintiff," without saying, "received *by the defendant*."

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The Court said, that the affidavit sufficiently indicated the ground on which the plaintiff had holden the defendant to bail; that it was upon a bill of exchange drawn by the defendant, on which he was justly indebted to the plaintiff, and it was not necessary for the plaintiff to specify in what particular character, whether as payee or indorsee, he claimed: if he had no interest in the bill on which he could sue the defendant he would be guilty of perjury, and would be liable to an action for maliciously holding the defendant to bail. The object of requiring an affidavit of the debt, in order to hold a defendant to bail, was to prevent any person being holden to bail for a larger sum than was due, and therefore it is properly required that the cause of action shall be stated; but this is sufficiently particular to give the defendant notice on what account he is sued.

Rule discharged.

(*a*) 3 *Term Rep.* 338.

END OF MICHAELMAS TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Hilary Term,

In the Forty-sixth Year of the Reign of GEORGE III.

1806.

TRENT, Widow, and Others, *against* HANNING and Others.

THE following case was sent by the master of the Rolls for the opinion of this Court.

John Trent, being seised in fee of certain plantations and premises in the island of *Barbadoes*, in contemplation of a marriage between him and *Eliza Phipps*, which soon afterwards took effect, by indenture of lease and release, dated the 29th and 30th of *October* 1792, bargained, sold, aliened, released, and confirmed the said plantation and premises to *S. Estwick*, to hold to him, his heirs and assigns, to the use of the said *John Trent* till the marriage, remainder to the use of the said *John Trent* for life, * without impeachment of waste, remainder in trust to secure an annuity of 500*l.* a year for her life to the said *Eliza Phipps*, in lieu of dower, remainder to trustees for 200 years, for better securing the payment of the said annuity, remainder to *John Trent* in fee. *John Trent*, on the 5th of *August* 1796, by his will, (duly executed and attested,) devised as follows: "I *John Trent* do hereby give unto my wife 200*l.* "per annum during her natural life, in addition to her join-

Under a devise to the testator's widow of "200*l.* "per annum "for life in "addition to "her join- "ture," (which jointure it appeared was secured by a term out of his real estates,) "his "debts being "previously "paid; and "to his "younger "children "6000*l.* "each, to "be paid "respective- "ly at 21.": after which the testator "appointed *A. B.* and *C. as trustees of inheritance* for the execution thereof:" held by three Judges, that the trustees thereby took a fee in the testator's *lands*; against one Judge, who thought the meaning of those words too uncertain to disinherit the heir at law.

1806.

TRENT *against* HANNING.

" ture, my just debts being previously paid: and I do give " unto my two younger children 6000*l.* each, to be paid when " they severally come to the age of twenty-one: and I do ap- " point *J. Hanning*, *W. Hanning*, and *C. Phipps*, *as Trustees* " *of inheritance for the execution hereof.*" *John Trent* afterwards died without altering or revoking his said will, leaving his widow, the two younger children mentioned in his will, and a child born afterwards, to whom he gave 6000*l.* by a codicil, him surviving. *C. Phipps* survived *John Trent*, but is since dead. The questions for the opinion of the court were, 1st, Whether *J. Hanning*, *W. Hanning* and *C. Phipps* took any and what estate or interest in the real estates of the said *John Trent*, under and by virtue of his will? or, 2dly, Whether they had by virtue of such will, a power to make any conveyance or appointment of any and what estate or interest of or in such real estates? And if they had, 3dly, Whether such power survived to *J. Hanning* and *Wm. Hanning?* This case was argued in *Easter* term last, when

Peake for the Plaintiff, upon the first question, contended that the trustees took a fee in all the real estates of the devisor. Admitting that the heir at law can only be disinherited by express words or necessary implication: yet if the court see plainly that the devisor's intention was to dispose of or charge his real estates, they will give effect to it though not technically expressed. Here his intention plainly was to provide for the payment of his debts, for his widow, and for his younger children, (his eldest son being otherwise provided for,) out of his real property. For this purpose his will is executed and attested as required by law for charging real property. He gives his wife 200*l.* per annum *in addition to her jointure;* which jointure, being secured out of lands, his coupling the two together seems as if he contemplated the same security; and then he appoints three persons " trustees *of inheritance*" for the execution of his will. This must mean trustees of something which could be *inherited*, and that could only be *land;* the term is inapplicable to *personal* property: it must mean too a *descendible* interest in land, something which was the proper subject of devise to the trustees and their *heirs* till the purposes of the trust were completed. This would give the trustees a fee. Besides, many cases have occurred where trustees have been holden to take a fee, it appearing to be necessary for the purposes

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purposes of the trust, though not expressly devised to them. In *Gibson* v. *Lord Mountford*, (*a*) Lord *Hardwicke* states that as an established rule. (Lord *Ellenborough*. To be sure trustees must in all cases be presumed to take an estate commensurate with the charges or duties imposed upon them.) The very appointment implies a duty to raise the money for the debts and portions, and to pay the annuity: and the law implies such an estate or interest as will enable them to do these things. The term *trustees* is known to the law, as persons in whom the legal [100] estate is vested; and these persons are expressly appointed *trustees* for the purposes of the will. In *Oates* d. *Markham* v. *Cooke*, (*b*) where the testator, after giving several small annuities, some for life, others in fee, one of which annuities for life was directed to be paid by his *trustee* or executor, then directed "these legacies to be paid by his *trustee J. Cooke*, every year," &c.; this was holden to pass the fee by necessary implication to the trustee, though there were no words of inheritance or technical terms to pass the estate: and that was the stronger, because an annual sum was left to the trustee *out of the yearly rents*, for repairs, &c. In *Taylor* v. *Webb* (*c*) the devise was thus, "I do make my cousin *G. B.* my sole *heir* and my executor," which was deemed to pass the fee-simple (*d*) of the devisor's lands to *G. B.* being the same as if the devisor had made *G. B.* "*heir of his lands.*" In that case nothing was said of the devisor's *lands:* but it was considered that by designating *G. B.* as his *heir* the devisor shewed an intention that *G. B.* should have his lands, as the law would have given them to his *heir*. Now here the words "Trustees *of inheritance*" cannot relate to any thing but the devisor's *lands;* as if he had said trustees or devisees of *the inheritance* for the purposes of the will. A devise of *my inheritance* will pass the fee. (*e*) 2dly, If the legal *estate* be not vested in the trustees, at least they have a *power* to raise the legacies out of the *land*. Though there should be no cases noticed in the books of *powers* raised without express words, yet if the court see such an intention they will give the power necessary to carry the will into effect. When therefore the testator, after directing certain [101]

(*a*) 1 *Ves.* 491.

(*b*) 3 *Burr.* 1684. & vide *Shaw* v. *Weigh*, 2 *Str.* 798.

(*c*) *Styl.* 301. 307, 319. (*d*) This appears from *Marrat* v. *Sly*, 2 *Sid.* 75. (*e*) *Widlake* v. *Harding*, *Hob.* 2.

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legacies to be paid, appoints these persons "trustees of inheritance for the execution thereof," he must necessarily have intended that they should have some fund out of which to raise the money, and that they should raise the money at the appointed time. The fund is *the inheritance*, i. e. the *land* of the testator: and they must have such a disposing power over the land as is necessary for the purposes required, that is, by sale (*a*) or mortgage. 3dly, Though it be only a power, yet the two surviving trustees may execute it. The general rule is, that all those who are named must join in the execution of a bare power, not coupled with an interest: but *Lock* v. *Loggin* (*b*) takes the distinction, which is recognized in other cases, (*c*) that if the testator devise generally that his *executors* shall do an act, and then appoint three, and one die, the survivors shall do it; in these cases it seems to be now considered that the power is annexed to the *office* and not to the persons. Now, in this case, by adding the words "*of inheritance*" to the general description of *trustees*, the testator must have intended that their *heirs* should have the same as themselves, and consequently the power would survive and descend to the heirs of the survivor.

Moore, contrà. An heir at law can only be disinherited by express words or necessary implication; but no necessity exists here for raising an implication of such an intention, the words themselves do not import it; and it cannot be collected from the mere circumstance of having three witnesses to the will, which might be merely accidental. The testator does not appoint the defendants *trustees*, but *as* trustees, &c.; and not "trustees of *his* inheritance," but only "trustees of *inheritance*;" leaving it very doubtful from the very ambiguity of the expression whether he knew the legal import of the word *inheritance*. He might have considered it as comprising personalty, as it does in the civil law: (*d*) or he might have meant to appoint these persons and *their heirs* to be his trustees till the purposes of the will were answered; which would not pass the fee to them. In *Oates* v. *Cooke*, (*e*) not only the legacies were to be paid by the *trustee*, but *he and his heirs* were to see that the testator's tomb was kept in order; which could not be satisfied without giving

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(*a*) *Long* v. *Long*, 5 *Ves. jun.* 445. (*b*) 1 *And.* 145.

(*c*) Several others were mentioned, but Lord *Ellenborough* observed, that they were all collected in Mr. *Hargreave's* notes in *Co. Lit.* 113. 114. *b.*

(*d*) Vide *Styl.* 319. (*e*) 3 *Burr.* 1684.

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the trustee a fund sufficient for these purposes. And in *Doe* v. *Snelling* (*a*) this distinction was recently taken, that if there be a personal charge on an executor or trustee in respect of the realty, it passes the fee. But here is no personal charge on these trustees. In *Taylor* v. *Webb*, (*b*) Lord C. J. *Rolle*, said, that they might collect the testator's intention to be, by making the party *his* heir, that he should have his lands; and that it was all one as if he had said "heir *of his lands:*" particularly as in that case he had made the party his *executor* also, which gave him his goods; and therefore if he had not his lands the word *heir* would be merely nugatory. There too the devisee had annuities to pay; (*c*) which alone was sufficient to carry the fee; and the testator directed him where to find the conveyances and assurances of his lands. (*d*) And in the subsequent case of *Marret* v. *Sly*, (*e*) the Court considered that the testator's intention to pass his lands plainly appeared. Then as to any intention to secure the widow's annuity of 200*l.* on his lands by declaring it to be in *addition to her jointure*, which was so secured, upon the presumption that the security was to be *ejusdem generis;* he must have intended to raise a term such as that on which the jointure was secured; but how can such a construction be made on the words of this will; and what duration shall be given to the term? At any rate it cannot shew that the testator meant these persons to take a fee. It is rather to be collected from the words of the will that he meant the *annuity* to be paid out of the same fund as the debts, which are to be *previously* paid: and these must of course be paid out of the personalty, unless there be a manifest intent to charge the realty, which none of the words naturally import; and non constat but that the personalty may have been sufficient for both purposes. He then referred to the rule laid down by Lord C. J. *Vaughan*, in *Gardner* v. *Sheldon*, (*f*) who takes this difference concerning estates that pass by implication in a will; "that an estate given by implication of a will; if it be to the disinheriting of the heir at law, is not good, if such implication be only *constructive and possible*, but not a *necessary* implication. I mean, says he, by a *possible implication*, when it may be intended that the testator did purpose and had an intention to devise his lands to *A.*; but it may also be as reasonably intended that he had no such purpose

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(*a*) 5 *East*, 37. (*b*) *Styl.* 319. (*c*) Ib. 301. 308.
(*d*) Ib. 308. (*e*) 2 *Sid.* 75. (*f*) *Vaugh.* 262.

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to devise it to *A.* But I call that a devise by *necessary implication* to *A.*, when *A.* must have the thing devised or none else can have it." [*Lawrence* J. That rule is narrowed by Ld. C. J. *Willes* (*a*) to this, " that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited."] Here there is no such plain intent. 2*dly*, As to this being a power to raise money; no intention of creating a power appears from the words of the will; nothing is said of any act to be done, such as to sell, to mortgage, &c.; and there is no instance of implying a power. Where indeed trusts are created, and no person is appointed to execute them, the Court of Chancery will direct their execution under its own controul; but this Court have no jurisdiction to consider that. Besides, the words of the will are inconsistent as to the nature and extent of the power to be implied; for if the term *inheritance*, as here used, shew an intention to charge the portions on the land, it must give the trustees a *fee-simple;* but the jointure being secured only by a *term*, which is not a security of inheritance, the addition of the 200*l.* a-year to the widow could only be meant to be secured in the same manner. 3*dly*, As to the survivorship, a naked power, such as this must be, if any, has never been holden to survive, unless where given to *executors* generally, who take as it were *virtute officii*. The cases are collected in *Co. Lit.* 113. *b.* But the exception does not extend to *trustees*, who have no powers necessarily incident to them by law; but only such as are given to them by those who create the trusts. Even as to executors who are named, the only cases cited in the note to *Co. Lit.* 113. *b.* in favour of the power surviving are *Keilw.* 44 and 2 *Brownlow*, 194; but they were merely dicta. The first was in the 17 *H.* 7. and is contradicted in the Year-book 19 *H.* 8. fo. 9, 10, 11.: the other was only the dictum of *Winch*, in the 10 *Jac.* 1., nearly twenty years

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before the publication of *Co. Lit.*, and has the subsequent authority of Lord *Coke* against it in his comment on sect. 169. of *Littleton*, who says the law was, that if one executor refused to sell, the others could not sell till the stat. 21 *H.* 8. *c.* 4.: (*b*) and in *Yates* v. *Compton*, (*c*) which is the latest case referred to, Lord *King* decreed that the *heir* should join in the sale.

(*a*) *Moore* v. *Hoaseman*, *Willes*, 141. & vide the same opinion delivered by Ld. Ch. *Willes* in *Rocd. Fulham* v. Wickett, ibid. 309.

(*b*) Sed vide Lord *Kenyon*'s opinion in Withnell v. *Gartham*, 6 *Term Rep.* 396. (*c*) 2 *P. Wms.* 308.

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Peake, in reply, said, that no other meaning had been attempted to be given to the words of the will than what he had contended for; and unless they would bear that construction, the will would be waste paper. And he observed, (though it was not stated in the case,) that the personal estate was deficient for the purposes of the will, which had given rise to the present question. As instances of estates raised by implication in favour of persons to whom there was no express devise, he cited *Willis* v. *Lucas*, (*a*) and other cases there referred to. And as to the distinction contended for between a power given to executors by name and to executors generally, that the latter only should survive; that was sufficient for the present purpose, where the persons named in the will were appointed *trustees of inheritance* generally for the execution of the will. And it was sufficient in *Yates* v. *Compton* to make the heir join in the sale for the satisfaction of a purchaser; but no opinion was given on the necessity of it.

The Court said, that they would look into the cases, and certify their opinions.

On the 18th of *December* Lord *Ellenborough* C. J. and *Grose* and *Le Blanc* Justices, certified as follows. [106]

We have heard this case argued; we have considered it; and it appears to us, attending to the whole of the will, that the testator *John Trent*, in appointing *John Hanning*, *William Hanning*, and *Constantine Phipps*, as trustees of inheritance for the execution of his will, plainly meant to make them trustees of his estates of inheritance, in the same manner as if he had used the words "trustees of *my* inheritance," or "trustees to inherit *my* said estates for the execution of this my will." We are therefore of opinion that *John Hanning*, *William Hanning*, and *Constantine Phipps* took an estate in fee in remainder in the said real estates of the said *John Trent*, subject to the term of 200 years created by the settlement.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.

LAWRENCE J. certified as follows.

The rule of law being, that the intent of a testator to disinherit his heir at law must be clear and plainly appear in his will,

(*a*) 1 *P. Wms.* 472, & vide *Walter* v. *Drew*, *Com. Rep.* 372.

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otherwise his heir shall not be disinherited, the questions submitted to the consideration of the court depend upon this, viz. Whether such intent do so appear? And I do not think it does. For the testator has not made any mention whatsoever of his lands, nor has he in any manner referred to them; the addition to his wife's jointure is not charged upon them; and that part of his will may be well satisfied if the personal estate be the fund for paying it. The giving his wife 200*l.*, in addition to her jointure, is but giving her that sum over and above the jointure; and it will not be less an addition to it if it be payable from a different fund. The legacies to the children are given in terms as general as possible. And the principal ground on which it has been contended that the testator devised his *lands* for the payment of them is furnished by that part of the will which appoints certain persons to be "*trustees of inheritance* for the execution thereof;" which expression, though it may furnish ground to conjecture that the testator meant that they should take his real estate, to enable them to execute his will, is, I think, too uncertain to pass such estate. The use of any expression made so inaccurately as it cannot but be admitted this has been, without any circumstance to fix such its sense and meaning, and that by a person ignorant of legal forms, as the testator appears to have been, will not in my opinion, enable the Court to say that it must be understood with reference to his real estates. *Inheritance* might be supposed by the testator to be more generally applicable to things *personal* than it is when properly used; or that the mode in which things real and personal are transmitted to those, who as the representatives of their owners are entitled to them on their deaths, was an acquisition by *inheritance* as much in one case as in the other: he might suppose that things personal would actually descend to an heir; or he might mean by the expression he has used, to point out those who should succeed to the trusts on the deaths of the persons whom he had named in his will, and that in their heirs those funds should be vested, which, without any charge on his real estate, would be applicable to satisfy the bequests to his wife and children. And I think it would be going much beyond any of the cases which are to be found in our books to hold that this in any way affects the real estates of the testator. I am therefore of opinion, that *John Hanning*, *William Hanning*, and *Constantine Phipps* did not take any estate or interest in the real

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real estates of the said *John Trent*, and that they had not by virtue of his will a power to make any conveyance or appointment of any estate or interest of or in such real estates.

S. LAWRENCE.

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SPENCELEY, qui tam, &c. *against* DE WILLOTT.

Monday, Jan. 27th.

AT the trial of this action for usury before Lord *Ellenborough* C. J. at the sittings after last term at *Westminster*, wherein the usury was alleged to have been committed by the Defendant in a contract made by him with the *French* Marquis de *Chambonas*, the Plaintiff's case was proved by the Marquis, who on his examination in chief swore, in substance, that the defendant had advanced to him the sums of money mentioned in the declaration, at the rate of about 10*l.* per cent. per month, and not by way of partnership; and there was no question of the usury if the Marquis were believed. But the defendant's counsel intending to discredit the witness, on cross-examination proposed to ask him what contract he had made with a Mr. *Schullenburg*, and with several other third persons from whom he had also taken up money, on the same and on other days on which the contract in question was made; and this, for the purpose of drawing from the witness the confession that he had taken up sums of money from those third persons on terms of confidence that he was to employ the money so raised according to his own discretion, (which he had suggested to them he was enabled to do to great advantage), and to share with them the profits whatever they might be: the defendant's counsel intending, if the witness answered in the affirmative, to draw from thence a conclusion that he had made the same contract with the defendant, (which was suggested to be the fact) with whom as with those third persons he was living at the time in habits of frequent communication and familiarity; or if the witness denied that such was the nature of his dealings with those persons, to call Mr. *Schullenburg* and the others to prove the contrary, and thereby destroy the witness's credit. Lord *Ellenborough*, however, refused to suffer the question to be put to the witness on his cross-examination, conceiving it to be entirely irrelevant

A witness cannot be cross-examined as to any collateral independent fact irrelevant to the matter in issue; for the purpose of contradicting him if his answer be one way by another witness, in order to discredit the whole of his testimony.

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irrelevant to the issue in the cause; and that it was not allowable for a counsel on cross-examination to put to a witness any question concerning a distinct collateral fact not relevant to the issue, for the purpose of disproving the truth of the expected answer by other witnesses. The plaintiff having obtained a verdict for 25,200*l.*

Erskine now moved for a new trial, first, on the ground of the rejection of the evidence proposed to be obtained upon the cross-examination of the witness; and, 2*dly*, upon an affidavit that the plaintiff had published a statement of the case, which was distributed about the court and the hall before and at the time of the trial. On the first ground he reasoned generally upon the inconvenience and danger to truth and justice if a witness, perhaps unknown, who swore to a fact stated by him to have passed in secret or confidence with a party to the suit, when no other witness was present with whom he could be confronted,

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could not have his credit tried by a cross-examination as to collateral matters, whereon, if he spoke falsely, the falsity was capable of being shewn by other witnesses. That this was of peculiar importance in criminal cases, where a person unjustly accused of secret offences could often have no other means of defending himself. But

The Court were all decidedly of opinion that it was not competent to counsel on cross-examination to question the witness concerning a fact wholly irrelevant to the matter in issue, if answered affirmatively, for the purpose of discrediting him if he answered in the negative by calling other witnesses to disprove what he said. That in this case, whatever contracts the witness might have entered into with other persons for other loans, they could not be evidence of the contract made with the defendant, unless the witness had first said that he made the same contract with the defendant as he had made with those persons; which he had not said. They observed, that the rule had been laid down again and again, that upon cross-examination to try the credit of a witness, only general questions could be put, and he could not be asked as to any collateral and independant fact merely with a view to contradict him afterwards by calling another witness. The danger of such a practice would be obvious; besides the inconvenience of trying as many collateral issues as one of the parties chose to introduce; and which the other could not be prepared to meet. Ld. *Ellenborough* added, that

that he had ruled this point again and again at the Sittings till he was quite tired of the agitation of the question; and therefore he wished that a bill of exceptions should be tendered by any party who was dissatisfied with his judgment, that the * question might be finally put at rest. And *The Court* desired to have it understood that they rejected the motion for a new trial on the first ground, and granted a rule nisi on the second ground alone, upon the affidavit of the publication, and distribution of the plaintiff's statement of his case at the trial.

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SALT, One, &c. *against* RICHARDS and Others, in Error.

Monday, Jan. 27th.

DAMPIER moved that the Defendants in error might have their costs of the *non pros* of the writ of error, (which writ of error was non prossed for not transcribing the record,) to be taxed by . . . . . The defendants in error brought their original action on the case in this court against the Plaintiff in error, who let judgment go by default, and final judgment thereon was signed on the 11th of *July* 1805; and on the 5th of *July*, before execution, he brought his writ of error in the Exchequer Chamber, directed to the Lord Ch. J. of this court, in *Michaelmas* term last. On the 26th of *November* judgment of *non pros* was signed by the clerk of the errors in this cause for not transcribing. Two questions were made, 1st, Whether the defendants in error were entitled at all to the costs of such non pros; and if they were, 2dly, by whom such costs were to be taxed? 1st. It appears that costs are given in this case by the stat. 3 *H.* 7. *c.* 10. which reciting that plaintiffs or demandants that have judgment to recover were often delayed of execution by the defendants or tenants suing writs of error for delay, enacts, "that if such defendant or tenant, &c. sue, afore exe-
"cution had, any writ of error to reverse any such judgment, [112]
"in delaying of execution, then if the said judgment be affirmed
"good in the said writ of error, or that the said writ of error
"be discontinued, &c. or non prossed; then the person against
"whom the said writ of error is sued shall recover his *costs* and
"damage for his delay and wrongful vexation in the same *by dis-*
"*cretion*

No costs are allowed on the stat. 3 *H.* 7. *c.* 10. where a writ of error is non-prossed before the transcript of the record by the clerk of the Errors of B. R.

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"cretion of the justice afore whom the said writ of error is sued." The writ of error is an original writ, issued out of Chancery, (*a*) directed to the Lord Chief Justice of this Court, commanding him to certify the record and all things concerning the said judgment into the Exchequer Chamber, to be there examined by the Justices of the Common Bench and Barons of the Exchequer. The writ of error is then allowed (*b*) by the clerk of the errors (*c*) in this court, who keeps it in the error office; and when it is returnable the defendant in error, in order to quicken the plaintiff's proceedings, serves him with a rule *to transcribe*, i. e. to certify the record within eight days, or otherwise that a nonsuit will be entered; which rule is given also by the clerk of the errors in this court, who does not however prepare the transcript till he receives the money. If the transcript money be paid in time the cause proceeds in the court of error; but if it be not paid, the clerk of the errors, at the end of the eight days, having given another rule or notice (*d*) to the plaintiff in error, that unless the transcript money, amounting to so much, be paid by such an hour on the morrow a *non pros* will be entered, signs judgment of *non pros* in a book kept in his office for
[113] that purpose. Now it could not have been the meaning of the statute of *Hen.* 7. that the defendant in error, to whom the costs of a non pros are given, should lose those costs because of the default of the plaintiff in error in not procuring a transcript of the record; and it is clear that till the transcript be sent out of this court into the Exchequer Chamber that court can have no knowledge of the matter. It follows, therefore, that in order to prevent a failure of justice, this court must have the power of awarding those costs before the transcript made and certified, which the court of error would have awarded in course if the writ of error had been non prossed after the transcript made and certified. The words of the statute are large enough to admit of this construction; for it directs that the defendant in error shall recover his costs, "by discretion of *the justice afore whom* the said writ of error is sued." By *the justice*

(*a*) Vide stat. 27 *Eliz.* c. 8.

(*b*) Vide 2 *Tidd's Prac.* 1099. 2d. edit.

(*c*) This is an officer appointed by the Lord Chief Justice of this Court.

(*d*) This is called the transcript note.

must

must be meant *the court;* and before the transcript be certified to the court of error, the writ of error, which is in the custody of the officer of this court who rules the parties, may be said to be *sued before this court.* Then, 2dly, though the Master of this court be the general officer of it for taxing costs in civil suits; yet there is no instance of his having taxed costs in error under these circumstances; for this reason, that he has no documents whereon to found his taxation: for before the transcript goes over to the clerk of the errors in the Exchequer Chamber the documents are with the clerk of the errors of this court: it follows therefore that the taxation, if it can be made at all, must be made by this latter officer. But he admitted that there was no instance of any taxation in such a case, which he attributed to the small amount of the costs before any transcript made.

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Comyn, contrà, agreed that "*the justice*" meant "*the court* afore whom the writ of error was sued;" but contended that this was a casus omissus in the act 3 *H.* 7. *c.* 10. and not supplied by any other statute; and that at common law no costs in error were allowed. The court "afore whom the writ of error is sued" must either mean the court of Chancery, out of which the writ issues, or the Exchequer Chamber, into which the record is to be removed by means of it; but in no construction can it mean the court whose judgment is to be reviewed. It is admitted that there is no precedent of any taxation of costs on the non pros of a writ of error for not transcribing; and that neither the Master of this court nor the clerk of the errors in the Exchequer Chamber, who are the proper officers for taxing costs in the respective courts, have any documents before them for making the taxation in question; which furnishes a fair presumption that no costs are allowable in such a case, within the act of parliament: and so the practice is stated to be in *Tidd*, (*a*) who cites 2 *Term Rep.* 17. and *Law and Practice of Error*, 31. The stat. 4 *Ann. c.* 16. *s.* 25. in part supplies the defects of the former statute by giving costs on quashing writs of error, but does not supply the defect in the present case.

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Lord ELLENBOROUGH C. J. It cannot be said that there is any failure of justice if the costs be not taxed in this case,

(*a*) 2 Vol. 1125, 2d edit.

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where it does not appear that the statute 3 *H.* 7. meant that they should be taxed. That statute says that the defendant in error shall recover his costs and damage "by the discretion of *the justice afore whom the writ of error is sued.*" Now taking for granted that *the justice* there spoken of means *the court*, yet by "*the court afore whom the writ of error is sued,*" can never be meant the court to whom the error is imputed. It must mean either the court of Chancery, out of which the writ of error issues, or the Exchequer Chamber, which is to review the erroneous judgment. But at any rate this court cannot be the proper forum to tax the costs, whatever other court, if any, were intended to do so. But I rather incline to think that the legislature did not mean to give costs in this case, because there is no court, properly speaking, before whom the writ of error is sued, without the transcript being certified to them. And the universal practice not to tax costs in this case confirms that construction.

The other Judges concurred: *Grose* and *Lawrence*, Js. adding that "*the court afore whom the writ of error is sued*" must mean the court of Exchequer Chamber, to whom the record was transferred, and who were to review the error imputed. And *Le Blanc* J. saying, that the legislature did not appear to have contemplated the costs which might grow before the return of the writ of error.

Rule refused.

RHODES *against* BULLARD.

Tuesday, Jan. 28th.

IN covenant, the Plaintiff declared upon an indenture whereby the Defendant demised to the plaintiff all that part of a certain messuage or tenement which then had been lately parted off by the defendant from the part occupied by himself, consisting of a kitchen, wash-house, (and other rooms specified,) and also a warehouse behind the said messuage, and also all that part of the yard belonging to the said messuage between that and the warehouse, (setting it out according to measure,) with all ways, waters, easements, &c. appertaining to the same, *habendum* to the plaintiff from the 25th of *Dec.* 1795 for a term of 21 years, at a certain rent, &c. And the defendant covenanted that *during the said term* (inter alia) he would permit the plaintiff to have free ingress, egress, and regress through the gate at the bottom of the yard belonging to the said messuage and premises to the said warehouse, *and the use of the pump in the said yard jointly with the defendant* WHILST THE SAME SHOULD REMAIN THERE, *paying half the expences of keeping it in repair.* And then the defendant, after averring his entry into and possession of the premises under the said indenture, and performance of the covenants on his part, assigned for breaches, 1st, " that during the continuance of the lease the defendant did not permit him to have the use of the said pump in the said yard jointly with the defendant *whilst the same remained there*, paying half the expence of keeping it in repair; but, on the contrary, whilst the said pump remained in the said yard the defendant wrongfully and injuriously prevented the plaintiff from the use of the said pump; and, 2dly, That the defendant *unnecessarily and without any reasonable cause, and in order to aggrieve and injure the plaintiff, removed and took away the said pump*, contrary to the form and effect of the said indenture; although the same would otherwise have remained there for the purpose in the said indenture mentioned, and although the plaintiff was always and is ready and willing to pay half the expence of keeping the same in repair; whereby, and not from any want of repairs or

The lessor after a demise of certain premises with a portion of an adjoining yard, covenanted that the lessee should " have the *use* of the pump in the yard jointly with himself, *whilst the same should remain there*, paying half the expences of repair." The words *whilst*, *&c.* reserve to the lessor a power of removing the pump at his pleasure; and it is no breach of the covenant though he remove it without reasonable cause, and in order to injure the lessee. But without those words it would have been a breach of covenant to have removed the pump.

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decay of the said pump, or any necessity, but that the same might and otherwise would have remained there, the plaintiff lost the use of the same and the profit and benefit thereof, &c. The defendant, by his plea, took issue on the first breach assigned, and demurred generally to the second breach.

Abbott, in support of the demurrer contended that the words, "*whilst the same should remain there*," made it optional in the defendant to keep or to remove the pump at his pleasure, and then the allegations, that it was removed *without reasonable cause*, and *in order to injure the plaintiff*, were made aggravations, and could not amount to a breach of covenant. He observed that there was no devise of the pump, and therefore the cases which shew that a party cannot defeat his own grant do not apply. And that this construction was not inconsistent with the undertaking of the plaintiff to pay half the expences of repair, because that was no more than a consideration for the use of it so long as the defendant found it convenient to let it remain there; and it was competent to him to impose that condition while it remained, without relinquishing his option
[118] to remove it. The contrary construction requires the words, "*whilst the same should remain there*" to be rejected.

Wigley, contrà. The meaning of a covenant is to be gathered from the plain natural sense of the words, and needs no technical terms to express it; and the covenant by the defendant to pay for half the repairs shews that both parties contemplated that the pump should remain there during the term; or at least that the defendant should not wilfully remove it. There is no occasion to reject the words, "*whilst the same should remain there:*" but the Court will give them such a construction as is consistent with the rest of the covenant and the apparent intention of the parties; and that may be done by considering them to mean, "*whilst the same should remain there without any default of the defendant in voluntary removing it.*" If therefore it were destroyed by fire or other accident during the term, that would have been an excuse; and the defendant would not have been bound to *renew* it, though he was bound to *repair* it whilst it was capable of repair. According to the defendant's construction he might have called on the plaintiff to pay half the expence of the repairs one day, and have removed it the next, which could not have been intended by the parties. And

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he cited *Griffith* v. *Goodhand*, (*a*) *Coles*'s case, (*b*) and *Hollis* v. *Carr*. (*c*)

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Lord ELLENBOROUGH C. J. The question turns on the meaning of a covenant in the lease whereby certain parts of a messuage, then lately parted off from the part occupied by the defendant, were leased by him to the plaintiff, with certain easements belonging to the same, for a term of 21 years. The [119] pump, it is to be observed, is not a specific subject of the demise. Then follows a covenant by the defendant that he will during the term permit the plaintiff to have free ingress, &c. through the gate in the yard, and "the use of the pump in the "yard, *whilst the same should remain there*, paying half the "expences of keeping it in repair." If the words "*whilst the* "*same should remain there*," had not been introduced, I should have thought the covenant meant to secure to the plaintiff the continual use of the pump during the term, and that the lessor would have been guilty of a breach of covenant by wilfully removing it. But this covenant, unlike the covenant for free ingress and egress through the yard, is qualified with the words *whilst*, &c.; and the question is, Whether by the introduction of those words the lessor did not mean to reserve to himself a power of removing the pump whatever might be his motive in doing so. And can we strike out words which are capable of a sensible meaning? Now taking the whole together, the meaning of the words will stand thus: the lessor says, I demise to you a certain part of a messuage, with certain easements, for a term; and during the term you, the lessee, shall have a free passage through a certain gate in the yard, and you shall, as long as I think proper to let the pump remain in the yard, have the use of it, you paying half the expence of repairing it; but I will not bind myself to continue it there, but reserve to myself an option, whether from choosing not to be at any expence or from whatever other motive, to remove it when I please. I can give no other meaning to the words *whilst*, &c. If those words had not been introduced I should have thought, according to the case of *Pomfret* v. *Ricroft*, (*d*) that the demise of the *use* of [120] the thing was a demise of the thing itself, and that it must have been intended that the parties meant that the pump should remain there during the whole term; but by the introduction of

(*a*) *T. Raym.* 464. (*b*) *Salk.* 196. (*c*) 2 *Mod.* 86.
(*d*) 1 *Saund.* 321.

those

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those words it appears, that the lessor meant to reserve to himself the liberty of removing it, from whatever capricious or unreasonable motive he might do so, and consequently the breach is ill assigned.

GROSE J. It is material to consider that there are no words of demise of the use of the pump; but the lessor, in a subsequent part of the lease, covenants that the lessee shall have the use of the pump jointly with himself, *whilst the same should remain there*, &c.; the fair construction of which is, that it should be in the lessor's option how long it should remain there: and that is not inconsistent with the stipulation that the lessee should pay half the expences of repair whilst it did remain there.

LAWRENCE J. inclined to think that this was the true construction of the words of the covenant, though he doubted whether the parties had really so intended. He rather thought that they meant to have said what the plaintiff's counsel had contended for; but they had not used words to express such intention.

LE BLANC J. The parties probably meant to say no more than this, that as long as the lessor kept the pump in repair the lessee should have the use of it, he paying to the lessor half the expences of repair. And if the words had stopped there, the
[121] lessor could not have taken it away. But the only meaning of adding the other words, "*whilst the same should remain there*," must have been to reserve to the lessor the option of removing it.

Judgment for the Defendant.

Lady

Lady WILSON *against* Sir FRANCIS WILLES, Knt.

Tuesday, Jan. 28th.

TRESPASS for breaking and entering the close of the Plaintiff, called *Hampstead Heath*, in the parish of *St. John, Hampstead* in *Middlesex*, and *digging* certain *turf*, of the plaintiff there being, viz. 100 square yards of the plaintiff's *turf, then covered with grass, and fit for the pasture of cattle*, of 20*l.* value, and carrying away and converting it to the Defendant's use. Plea 1. Not guilty of the force, &c.; and as to the residue of the trespass, that the locus in quo is, and at the said time when, &c. was, and from time immemorial has been, a certain large waste situate within and parcel of the manor of *Hampstead* in *Middlesex*, within which manor there have immemorially been divers customary tenements demised and demisable by copy of court rolls, &c., in fee-simple or otherwise, at the will of the lord, according to the custom of the manor; and that within the manor there has immemorially been an ancient custom, that all and every the customary tenants for the time being respectively of all and every the aforesaid customary tenements *having a garden or gardens parcel of the same*, have immemorially dug, taken, and carried away, and have been used and accustomed to dig, &c. in, upon, and from the said close, in which, &c. *by themselves and their farmers and tenants* * respectively, *occupiers of such customary tenements* with the appurtenances respectively for the time being, *to be used and spent in and upon their said customary tenements* with their appurtenances respectively, *for the purpose of making and repairing grass-plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used* and spent, every year, *at all times in the year*, as often, and *in such quantity as occasion hath required*, as to their said customary tenements with the appurtenances respectively belonging and appertaining. The plea then

A custom that all the customary tenants of a manor *having gardens parcels* of their customary tenements respectively, have immemorially by themselves, their tenants and occupiers, dug, taken, and carried away from a waste within the manor to be used upon their said customary tenements, *for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively for the* IMPROVEMENT *thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used*, at *all* times of the year, *as often and in such quantity as occasion hath required*, is bad in law, as being indefinite and uncertain, and destructive of the common: and so is a similar custom for taking and applying such turf *for the purpose of making and repairing the banks and mounds* [illegible], and *for the* [illegible] *times* of such customary [illegible].

*[122]

stated

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stated a grant from the lord of one of the aforesaid customary tenements, consisting of a certain messuage and *garden*, &c. parcel of the manor, to the defendant, his heirs, &c. at the will of the lord, &c. by virtue of which he entered, and was seised, &c. and that being so seised, &c. at the said times when, &c. being times *when occasion required*, he entered into the locus in quo in order to dig, take, and carry away, and did then and there dig, take, and carry away the said turf in the declaration mentioned, the same being then found in and upon the said close, to be, and which afterwards was used and spent in and upon his said customary tenement, &c. for the purpose of making *two grass plots* in the said *garden*, parcel of the same as aforesaid, *for the improvement thereof;* the same turf being then and there fit and proper to be so used and spent, and *being such quantity as the occasion required*, as he lawfully might for the cause aforesaid, &c. The 2d special plea alleged more generally the same right in the customary tenants to dig, take, and carry away the turf to be used and spent in and upon their customary tenements, &c. *in and for the improvement of the gardens, parcels of the same* respectively; without confining the improvement to the making and repairing of *grass plots* therein. The 3d special plea alleged a similar right in the customary tenants to dig, take, and carry away, to be used and spent in and upon their customary tenements, *for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences thereof* respectively, such turf, covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used, every year, at all times of the year, as *often*, and in *such quantity as occasion hath required*. A 4th special plea laid the custom still more generally to be for the customary tenants to take the turf from the locus in quo as often and in such quantity as the occasion required, to be used and spent upon their customary tenements respectively, *for the improvement thereof*. To all the special pleas there was a general demurrer, and joinder.

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Const, in support of the demurrer. The right set up, unlimited in its nature, and undefined in its terms, goes to the destruction of the whole common. It is not even confined to *ancient* gardens; for it is prescribed for every customary tenement *having a garden parcel of the same;* which may include a garden recently

recently made. The turf may be taken at *all times* of the year for the *making and repairing grass plots* in such garden; which may comprise the *whole* garden, the extent of which need only be limited by the customary tenement itself and its appurtenances. It may be taken when *occasion* requires, of which the tenant is to be the judge. It is *for the improvement thereof;* a term of very large and doubtful signification, which may include all ornamental improvements. And the right is claimed for tenants and occupiers as well as for customary tenants. The custom stated in the second and subsequent special pleas is still more [124] general and objectionable; extending to taking turf for the making and repairing of banks and mounds, hedges and fences, and for the *improvement of the customary tenements* generally. the common law right of a commoner is confined to the taking of the grass by the mouths of his cattle (*a*) which right must be destroyed if the custom set up can exist: but it is a strong argument against its legality, that no custom to the like extent is recognized in the books. In *The Dean and Chaptor of Ely* v. *Warren*, (*b*) it was considered by Lord *Hardwicke* that a right in the tenants of a manor to dig turf in the extensive fen lands of *Cambridgeshire*, though it might be considered in such lands, which often lie under water for several years, to be no more than a compensation to the copyholder for the loss of his profit by grazing them, would be a very odd custom if applied to any other soil. The right of turbary is indeed very frequent: but that might be supposed to arise from necessity in times when other fuel was not easily procured; but even that, as Lord *Hardwicke* observes in the same case, is confined to such a quantity as is sufficient for the house (*c*) to which the common is appendant. And he considered it as a great absurdity to lay the custom not only in the *tenants* but in the *occupants*, who, as tenants at will, could never have a right to take away the soil of the lord. And still more absurd is it to take turf *fit for pasture* for the purpose of making banks and fences. In *Wilkes* v. *Broadbent* (*d*) a custom set up for a lord of a manor, and his tenants, sinking pits for collieries in the freehold lands, to lay [125]

(*a*) Vide 45 *Ed.* 3. 25, 26. and *Bro. Common*, 48. cites 12 *H.* 8. 2. and vide 13 *H.* 8. 15, 16.

(*b*) 2 *Atk.* 189. (*c*) Vide *Tyrringham's* case, 4 *Rep.* 37.

(*d*) 2 *Stra.* 1224. and 1 *Wils.* 63.

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and continue the rubbish and materials, &c. on the lands of customary tenants near the pits, was holden void, as unreasonable and arbitrary, and tending to defeat the copyholder of the whole profits of his land, and to destroy his estate: and there it was laid down, that if any part of the custom be bad, it is void for the whole. So here this custom is unreasonable; for it tends to defeat the purposes for which the common was made, and to destroy the whole estate.

Lawes, contrà, contended that the custom was neither inconsistent with the right of common, nor unreasonable, nor uncertain. 1*st*, However inconsistent it may appear in the abstract, it appears that from all time it has existed in fact concurrently with the right of common. It is in its nature no more inconsistent with the right of common than the acknowledged right of turbary; and Ld *Coke*, (*a*) in enumerating the several sorts of common, mentions, in addition to that of turbary, that of digging for coals, minerals, and the like; in all which the soil itself, as *Blackstone* (*b*) observes, is lost to the lord; whereas here it is only transferred from one part of the manor to another. So in *Duberly* v. *Page* (*c*) the right of the tenants of a manor to dig gravel and sand on the waste was found for them; and this was not denied in *Shakespear* v. *Peppin*, (*d*) or in *Peppin* v. *Shakespear*, (*e*) to be a valid custom. This is not stronger than the case of *Hopkins* v. *Robinson*, (*f*) where a prescription for the tenants to have *solam pasturam*, in exclusion of the lord, was holden good. But non constat there is any
[126] right of pasture in this case but subject to the other right. 2*dly*, The reasonableness of this custom must depend upon the degree of its interference with the lord's rights; for he is the only person who can object to it. But it is a good consideration as to him that the custom tends to the improvement of the lord's own estate in the hands of the tenants; of which he will have the benefit either in the shape of increased fines on the deaths of the tenants, if the fines be uncertain and dependant on the value of the copyholds, or at any rate upon the forfeiture or reverter of the estate. And it is material to observe, that the right can only be legally exercised where there is an *improve-*

(*a*) *Co. Litt.* 122. (*b*) 2 *Black. Com.* c. 3. fit. 3. (*c*) 2 *Term Rep.* 391. (*d*) 6 *Term Rep.* 741. (*e*) Ibid. 746. (*f*) 2 *Lut.* 2.

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ment in fact of the customary tenement; of which the lord cannot justly complain. As to the objection that the custom is not alleged to be confined to the improvement in this manor of *ancient* gardens; supposing that were material, which does not seem to be necessary for the reason last mentioned, yet upon these pleadings it must be so understood; for it is laid that "every customary tenant of every the aforesaid *customary tenements*, having a *garden parcel of the same*, have *immemorially* dug, &c. turf to be used upon their said customary tenements *for the purpose* of making grass plots in *the gardens, parcels of the same.*" Now this custom could not have been used *immemorially* for the purpose of improving *the gardens, parcels* of the customary tenements, if such gardens had not existed immemorially. [All the Court, however denied this construction of the custom, as laid; and considered that it was claimed for any garden, parcel of the customary estate, whether ancient or not; they laid stress on the words, "*having a garden*," and "for repairing grass plots in *the gardens*;" not even saying the *same* gardens or *ancient* gardens.] As to the 3d special plea, he observed, that the right [127] claimed was nothing more than a species of hedge-bote, which every tenant enjoyed. It was to protect the property, and preserve the boundaries of the land, which was both convenient and reasonable. [Lord *Ellenborough* asked if there were any instance in the books of a custom to take away the soil of the lord to make bounds and banks for the tenant's estate; and especially to take that which was fit for the better purpose of pasture, and apply it to common and inferior purposes?] *The Court* then pressed him as to the uncertainty of the custom as laid. They asked what was meant by the word *improvement*; whether as applied to land it was not always confined to *agricultural* purposes? They observed that the claim was to take the turf *when occasion required*; and asked whether any precedent could be produced of pleading in so loose a manner the claim of any species of agricultural improvement: the occasion here was not confined to agricultural purposes; it might be for the purpose of building a summer-house. It was not confined to *necessary* repairs; it would extend to any fanciful repairs. (No answer being given to these suggestions)

Lord ELLENBOROUGH C. J. said, A custom, however ancient, must not be indefinite and uncertain; and here it is not defined

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what sort of *improvement* the custom extends to: it is not stated to be in the way of agriculture or horticulture: it may mean all sorts of fanciful improvements; every part of the garden may be converted into grass plots, and even mounds of earth raised and covered with turf from the common; there is nothing to restrain the tenants from taking the whole of the turbary of the common and destroying the pasture altogether. A custom of this description ought to have some limit; but here there is no limitation to the custom, as laid, but caprice and fancy. Then this privilege is claimed to be exercised *when occasion requires*. What description can be more loose than that? It is not even confined to the occasions of the garden. It resolves itself, therefore into the mere will and pleasure of the tenant, which is inconsistent with the rights of all the other commoners, as well as of the lord. The third special plea also is vastly too indefinite: it goes to establish a right to take as much of the turf of the common as any tenant pleases for making banks and mounds on his estate; it is not even confined to purposes of agriculture. All the customs laid therefore are bad, as being too indefinite and uncertain.

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The other Judges concurred.

Judgment for the Plaintiff.

Tuesday, Jan. 28th.

WILSON *against* KNUBLEY.

An action of *covenant* does not lie upon the stat. 3 H. & M. c. 14. against the devisee of land to recover damages for a breach of covenant made by the devisor: but the remedy thereby given is confined to cases where *debt* lies.

THIS was an action of covenant, wherein the Plaintiff declared against the Defendant as surviving *devisee of the lands*, &c. of *John Lawson* deceased, *there being no heir of the said J. L.*; for that whereas by indenture of release made on 6th of *Feb.* 1798, between *J. L.* of the one part and the plaintiff of the other, it was witnessed that in consideration of 1050*l.* paid to *J. L.*, he conveyed to the plaintiff in fee certain freehold messuages and lands, &c. at *Wigton*, in *Cumberland*, (describing them;) and *J. L.*, for himself and *his heirs*, covenanted with the plaintiff, her heirs, &c., that he was the true and lawful owner, and seised in his own right of a perfect and indefeazible estate of inheritance in fee-simple of and in the

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same premises, without any incumbrance thereon, &c. to alter, lessen, or defeat the same. The plaintiff then assigned for a breach, that the said *J. L.* was not, at the time of making the said indenture and conveyance, the true and lawful owner of the premises, nor was seised in fee of an indefeazible estate of inheritance in the same, &c., nor had authority or right to convey the same, &c. to the plaintiff in fee; by means of which the plaintiff was put to divers costs, charges, and expences, viz. 1000*l.* in defending an ejectment brought by *J. D.* on the demise of *J. G.* &c. against her to recover an undivided third part of the premises, the said *J. G.* being entitled thereto; and in the purchase of such undivided share; and in making satisfaction for the rents, &c. of such share, while the plaintiff held the same under the said indenture, &c. And then the plaintiff averred that *J. L. died without heirs;* and that the said *J. L.* in his lifetime, and the defendant *devisee* as aforesaid, since his death, though requested, had not kept the covenants so made by the said *J. L.* for himself and his heirs with the plaintiff, but has refused, &c. to her damage of 1000*l.* To this there was a demurrer, assigning for special causes, that the plaintiff has declared against the defendant as surviving devisee of *J. L.* deceased, upon breaches of covenant supposed to have been committed by him in his lifetime, and *has not joined the heir* of the said *J. L.* in the suit: and for that it appears by the declaration that the action is not brought against the defendant *as such devisee* in respect of any *obligation or other debt* due from the testator to the plaintiff, but in respect of certain *covenants* [130] of the testator, supposed to have been entered into and broken by him: and for that it is *uncertain* what *damages* the plaintiff has sustained, or may be able to prove by reason of such breaches of covenant: and for that it is not averred or shewn that any lands, &c. which were of the said *J. L.* at the time of his death have come to the defendant, or been in his hands as such devisee, out of which he may satisfy the damages, if any should be recovered against him as such devisee by reason of the supposed breach of covenant, &c. joinder, and

Yates, in support of the demurrer. The case of *Dyke* and another administrators v. *Sweeting*, (*a*) which was mentioned as an authority in support of the action when this case was called

(*a*) *Willes*, 535.

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on last term, does not apply; for that was *covenant* against an *heir*, which lay at common law, and did not want the aid of the stat. 3 *W. & M. c.* 14. But at common law no action either of covenant or debt lay against a devisee of land; for the devisee taking by purchase was not bound by the contracts of the testator. That statute, which was made in aid of the stat. 27 *Eliz. c.* 4. against fraudulent conveyances to defeat creditors, for the first time subjected the debtor's lands to the process of his creditors in the hands of the devisee: but that is a special remedy, which must be strictly pursued. For though *s.* 2. of the stat. of *W. & M.* avoids devises generally, as against creditors, yet the preamble only speaks of devises made to defraud *creditors by bond and other specialties* of their just *debts:* and the 3d section limits the remedy given to creditors; for it enacts that, "*for the means* that such creditors may be enabled to
[131] recover their said *debts* in the cases before mentioned, every such creditor shall and may have and maintain their *actions of debt* upon the said *bonds and specialties* against the *heirs* at law of such *obligors* and such *devisees jointly*. 2dly, He contended that at any rate the action would not lie against the devisee alone without joining the heir; for no such remedy at law was given by the statute, and a casus omissus could not be supplied by the averment that there was no heir. The devisor might have died possessed of other lands, and the present defendant would only be liable to his proportion. (*a*)

Wood, contrà, contended that the action of *covenant* was within the meaning and equity of the statute, being as much within the mischief to be remedied by it as the action of debt. The general object of the statute was to make the devisee liable to answer for those assets which would have been liable in the hands of the heir, if they had been suffered to descend: and as covenant would lie in such a case against the heir, according to *Dyke* v. *Sweeting*, so by an equitable and reasonable construction of the statute it should lie against a devisee. The act was levelled against *fraudulent devises*, and the remedy could not have been meant to be confined to a particular sort of action, which must in many instances defeat the object. It recites that "it is not reasonable or just that by the practice or contrivance "of any debtors, their creditors should be defrauded of their

(*a*) Vide *Hume* v. *Edwards*, 3 *Atk.* 693.

"just

" just debts; nevertheless it hath *often happened* that several " persons having by *bonds and other specialties bound themselves* " *and their heirs*, and have afterwards died seised, &c. have, to " the defrauding of such their creditors, devised the same," &c. *for remedying of which* it absolutely avoids as fraudulent all such devises against such creditors. The *action of debt* spoken of in the 3d clause is merely put by way of instance and example. The act speaks of debtors having bound themselves and their heirs by bonds and *other specialties*, not confining it to specific legal debts. Now here the plaintiff is as meritorious a creditor as if he had advanced his money on the security of a bond. If the lands had descended, there is no doubt that the heir would have been liable in damages for the breach of covenant: nor can it be denied that the devisee would have been jointly liable, if a collateral bond had been given by the testator for the performance of covenants; and yet in such action *damages* only are recovered. But the legislature could never have contemplated these distinctions when professing to give a remedy against fraud. Many cases have been ruled to be within the *equity* which are not within the *letter* of statutes. *Co. Lit.* 24. *b.* gives the rule where it is within the same mischief: *Plowd.* 59. applies it to statutes made for the redress of false covin, and to give a speedier remedy to right; to such as are in advancement of justice, and beneficial to the public weal: and by *Gooch's* case, 5 *Rep.* 60. acts made in prevention or suppression of fraud ought to have a favourable interpretation: and that was applied to the stat. 13 *Eliz. c.* 5. principally because it provides generally, as the act in question does, that the estate as to the creditor shall be void. So the stat. 4 *Ed.* 3. *c.* 7. entitled, " Executors shall have *an action of trespass* for a wrong done to their testator," reciting that, " in times past executors had not had *actions for a trespass* done to their testators, as of goods of the same testators carried away in their life, and so such *trespasses* have hitherto remained unpunished," enacts, [133] " that the executors in such cases shall have an action against the *trespassers* and recover damages," &c.: yet it was holden (*a*) in the Exchequer Chamber that an executor shall have an action upon the case de bonis testatoris come to the hands of another, and by him converted to his own use, &c. *by the*

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(*a*) 1 *Leon.* 194.

equity

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equity of the statute. 2dly, The allegation that the testator had no heir, (being in truth a natural child,) is sufficient to warrant the suing the devisee alone: and so Lord Chancellor *Cowper* thought in *Gawler* v. *Wade,* (*a*) though he held that the heir, where there was one, must be made a party, notwithstanding he had no real assets by descent. [*Lawrence* J. May it not be inferred from that case, that Lord *Cowper* thought if there had been no heir it would have been a reason for the creditor's going into equity?]

Yates, in reply, referred to *Westfaling* v. *Westfaling,* (*b*) as a case where a construction had been put upon this statute; but Lord *Hardwicke* there relied on the *words* being sufficiently large to extend the remedy of the statute to the case then before him, which was clearly within the mischief of it, and therefore he would not narrow them.

Lord ELLENBOROUGH C. J. The grievance now complained of, how great soever it may be, existed at common law down to the period of the stat. 3 *W.* & *M.;* by which statute the devisee is, for the first time, made chargeable jointly with the heir for the debts of his testator in respect of lands devised to him. I agree with the plaintiff's counsel, that the grievance recited in the preamble of the act would have led one to suppose that the legislature meant to have given a larger remedy than the action of debt. For it recites, &c. and by *s.* 2. it says, that all wills, &c. shall be deemed fraudulent and void as against such creditors: but when they come to provide the means whereby the creditors are to be remedied, they are more limited than the grievance recited. For *s.* 3. says, "*for the means* that such creditors may be enabled *to recover their said debts,* that *in the cases before mentioned* every such creditors shall have their *actions of debt* upon the said bonds and specialties," &c. If it had only said that they should have their *actions,* without more, there would have been ground for going the length of the argument of the plaintiff's counsel; but the legislature have expressly limited the means of recovery by such creditors to *actions of debt.* Supposing therefore that we could go to the extent of saying that an averment of there being *no heir* is equivalent to joining the heir, where there is one, in the action; supposing we could get over that difficulty; how could

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(*a*) 1 *P. Wms.* 100. (*b*) 3 *Atk.* 460.

We,

we, construing a comparatively recent act of parliament where a particular remedy is given by *action of debt* on bonds and specialties, where no remedy was before, extend it to actions of *covenant?* It is said, however, that the statute being made in advancement of justice and suppression of fraud, ought to be extended by equitable construction to meet the grievance; and the construction which has been put upon the stat. 4 *Ed.* 3. *c.* 7. is relied on. But that, it must be remembered, is a very ancient statute passed at a period when no great precision of language prevailed; and the body of the act does not speak of *actions of trespass*, though the instance put is proper for such an action; but it speaks of actions *for a trespass* done to the testator's goods; and it enacts that executors in such cases shall have *an action against the trespassers;* apparently using the word *trespass* as meaning a wrong done generally, and the *trespassers* as *wrong-doers:* (*a*) it does not specify the nature of the action. The words therefore were capable of letting in a construction which met the mischief intended to be redressed. But we cannot bring within the equity of the stat. of *W.* & *M.*, a remedy which the legislature have almost, as one may say, in express terms excluded; for it says what *the means* of such creditors recovering their *said debts* shall be, and in stating those means it only gives the *action of debt.* To extend it therefore to the action of *covenant* would be to legislate and not to construe the act of the legislature.

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GROSE J. At common law neither *debt* nor *covenant* lay against the devisee: but the legislature have given a remedy against him by the stat. 3 *W.* & *M.*; that remedy however is express, and is confined to the action of *debt.* And though the word *specialties* be used as well as *bonds*, yet construing the whole together it must be confined to such *specialties* on which the *action of debt* lies. And whoever looks at the statute attentively will see that such must have been the intention of the legislature: for it speaks all through of *debts;* but a mere breach of covenant cannot be considered as a debt. As to the argument drawn from the construction put upon the stat. 4 *Ed.* 3. my lord has given a clear answer to it.

LAWRENCE J. This is an attempt to extend the remedy given by the stat. 3 *W.* & *M.* against devisees to another form

(*a*) Vide *Peytoe's* case, 9 *Rep.* 73. *a* & *b.*

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of action than what is expressly given by that act. But though we should be glad to give the statute all possible effect in suppression of the species of fraud against which it was levelled as far as it will admit of, yet it will not admit of this extension. For in the very preamble it speaks of the practice or contrivance of *debtors* to defraud their *creditors* of their just *debts* by devising away their lands, &c. in such manner as such *creditors* have lost their *said debts;* and afterwards it proceeds to point out *the means* whereby such creditors may be enabled to recover their *said debts:* and then enacts, that *in the cases before mentioned* every such *creditor* shall have his *action of debt,* &c. against the heir of such *obligor* and such devisee jointly. All through it speaks of *debts,* which must mean existing debts. But what is this? it is an action of covenant to recover damages for a breach of the testator's covenant to make a good title to an estate; and part of the damages sought to be recovered is the amount of the costs and expences of defending an ejectment brought against the plaintiff by the owner of the estate who recovered it; which never could be considered as a *debt* due from the testator at the time of his death within the meaning of the act. Then as to the case relied on upon the construction of the stat. 4 *Ed.* 3. the words of that statute are very loose and general, and not confined, as in this case, to any particular form of action. Besides, in construing ancient statutes attention is alway to be paid to the language of the times. It speaks of a *trespass* as of a *wrong* generally; and it enacts, that the executors shall have *an action,* not saying what form of action, against the *trespassers,* meaning thereby *wrong doers.* But here the words giving the

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form of action are very precise; and we cannot extend the remedy to any other form of action, although I agree that it is within the mischief.

LE BLANC J. I agree that it would have been better for the legislature to have extended the remedy to cases like the present; but I doubt whether such cases were within their contemplation at the time of passing the act; and they are admitted not to be within the letter of it. The legislature seem only to have contemplated persons who had bound themselves in certain sums by bonds and other specialties, which they considered as *debts;* and they gave a remedy which was clearly only adapted to such bonds and specialties. They therefore only contemplated what were *debts* strictly so called, and did not mean

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to extend the remedy against devisees to the recovery of *damages* for breaches of covenants or contracts made by their testators. If then we were to bring this case, which is clearly not within the *words*, within the *equity* of the statute, we should be giving it a construction against what appears to have been within the contemplation of the legislature, and certainly against the express letter of the act: though I agree that it would have been better to have extended the remedy to the general mischief recited.

Judgment for the Defendant.

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Tuesday, Jan. 28th.

NEWTON, Assignee of STELFOX, a Bankrupt, *against* CHANTLER.

A bill of sale to a particular creditor of *all* the effects of a trader, in trust to satisfy his debt and pay over the surplus (if any) to the trader, is an act of bankruptcy, and of no effect as a conveyance, notwithstanding it was given by the trader *when under arrest at the suit of the particular creditor* for a just debt, and followed by an immediate change of possession.

IN trover for certain goods and stock in trade, late the property of the bankrupt, which was tried at the last Summer Assizes at *Chester*, a verdict was found for the Plaintiff for 300*l.* subject to the opinion of this court on the following case.

Stelfox, being a malster and trader, became indebted to the Defendant, a banker at *Northwich*, in 300*l.* and to the plaintiff in 690*l.* for just debts, who for recovery thereof respectively sued out bailable process against *Stelfox* in *June* 1803. The defendant's writ was first delivered to the sheriff, who thereupon arrested *Stelfox* on the 24th of *June* 1803. *Stelfox*, being in custody, upon that arrest, in order to procure his release agreed to give a bill of sale of *all his goods and stock in trade* to the defendant for securing the payment of his debt, who then declared that he should immediately put the same in force: whereupon a bill of sale on the said 24th of *June* 1803 was made and executed to the defendant by *Stelfox*; by which reciting that *Stelfox* was justly and truely indebted to the defendant in 300*l.* he, for the better and more speedy raising and paying the said 300*l.* granted, bargained, and sold absolutely to the defendant "*all and singular his household goods and furni-*

There was another writ out against the trader at the time, and he knew that he was in insolvent circumstances, but it did not appear that these facts were known to the particular creditor.

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ture, malt, stock in trade, and effects whatsoever, then remaining and being in, upon, or about the messuage or dwelling-house, malt-kiln, and premises, which he then inhabited and occupied, situated in *Rudheath,* and *all other his goods, chattels and effects whatsoever, in whose hands, custody or possession soever the same then were* or might be found, and *all his estate, right, title, and interest* of, in, and to the same, and every part and parcel thereof; to have and to hold all and singular the said goods, malt, chattels, and effects whatsoever thereby before granted, bargained and sold, or intended so to be, to the defendant, as his own proper goods, &c. for ever; to the intent and purpose that the defendant, his executors, &c. should and might by sale and disposal of all or any part of the said goods and premises raise the said sum of 300*l.* together with all reasonable costs and charges attending the sale and disposal of the said goods, &c. and render and restore the overplus of the said goods and money (if any be) unto him, *Stelfox,* his executors or administrators." And *Stelfox* did thereby for himself, his executors, &c. warrant the said goods, &c. to the defendant against himself (*Stelfox*) his executors and administrators, and against all and every other person and persons whomsoever: of which goods and chattels, the bill of sale further stated that he had put the defendant in full possession by delivery of a knife at the sealing and delivering of those presents. The defendant on the said 24th of *June* 1803, and immediately after the execution of the bill of sale, took possession by virtue of the bill of sale of the property thereby assigned, being the property mentioned in the declaration, and without loss of time caused the same to be sold; and the proceeds of the sale, after satisfying an extent before that time duly issued at the suit of the Crown against *Stelfox*, amounted to 300*l.* *Stelfox* at the time of executing the said bill of sale knew that he was in insolvent circumstances; but he had not then committed any act of bankruptcy.

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On the 6th of *July* 1803 a commission of bankrupt duly issued against *Stelfox* on the petition of the plaintiff, under which he was declared a bankrupt; the commissioners being of opinion that the execution of the bill of sale to the defendant was an act of bankruptcy; and the plaintiff being duly chosen assignee, an assignment was duly executed to him of the personal estate and effects of the bankrupt. The question was, Whether the plaintiff

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tiff were entitled to recover? If he were, the verdict was to stand: if not, a nonsuit was to be entered.

Richardson for the plaintiff. The question is, whether a bill of sale executed by a trader of *all* his effects to a particular creditor to satisfy his debt, rendering the surplus (if any) back to the trader himself, is not an act of bankruptcy? The stat. 1 *Jac.* 1. *c.* 15. *s.* 2. enacts, that every trader who shall "make any *fraudulent* grant or conveyance of his lands, goods, &c. to the intent *or whereby* his creditors may be defeated *or delayed* for the recovery of their just debts, shall be adjudged a bankrupt." In the construction of which the *fraud* spoken of has not been confined to *moral* fraud, but any conveyance is a fraud within the meaning of the act, which necessarily defeats or contravenes the great object of the bankrupt laws; which is, that when a trader's affairs come to a stop, he shall not carve out his whole estate to a particular creditor, but it shall be devested out of his management, and placed in the hands of trustees appointed by statute, for the purpose of being distributed equally amongst all the creditors. Now a conveyance of *all* a trader's property must necessarily break up his trade, and delay all the rest of his creditors till the particular creditor is satisfied; and if he be in- [141] solvent, it must necessarily defeat them. The cases of *Miles* v. *Williams*, (*a*) *Worsley* v. *De Mattos*, (*b*) *Wilson* v. *Day*, (*c*) *Alderson* v. *Temple*, (*d*) *Law* v. *Skinner*, (*e*) *Rust* v. *Cooper*, (*f*) and *Butcher* v. *Easto*, (*g*) are all full to this purpose, and the latter is strongly in point to this case. For though *Revett* the trader was not arrested at the suit of *Easto*, but of another person, yet the bill of sale was given to *Easto* as a security for his bailing *Revett*, then in custody under that process: and it cannot make any material difference to whom the security be given, as in either case it is equally given by the trader under the compulsion of legal process, and in order to free himself from arrest. In *Cox* v. *Morgan*, (*h*) it was indeed determined by two Judges against one in *C. B.* that a payment of a bill of exchange to a creditor, made under an arrest, was protected by the stat. 19 *Geo.* 2. *c.* 32. as a payment "*in the usual and ordinary course of trade and dealing*," the creditor not knowing that the debtor had committed a previous act of bankruptcy, or that he was

(*a*) 1 *P. Wms.* 251. (*b*) 1 *Burr.* 476. (*c*) 2 *Burr.* 827.
(*d*) 4 *Burr.* 2235. (*e*) 2 *Blac.* 996. (*f*) *Coup.* 629.
(*g*) *Doug.* 295. (*h*) 2 *Bos. & Pull.* 398.

even

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even in insolvent circumstances. But at any rate this is very distinguishable from that case, for a bill of sale of all a trader's effects can in no respect be considered as a payment within that act.

J. Clarke, contrà, admitted that the present question turned upon the construction of the stat. 1 *Jac.* 1. *c.* 15. *s.* 2. the material word of which is the word *fraudulent:* but in order to ascertain whether any particular grant or conveyance be *fraudulent* or not, the court must look to the circumstances before and
[142] accompanying the deed, and cannot collect it from the inspection of the deed itself. In *Worseley* v. *De Mattos*, (*a*) Lord *Mansfield* considered the deed itself as equivocal and indifferent upon the face of it, and he looked only to the extraneous circumstances to decide whether or not it were fraudulent. Now here no moral fraud can be imputed to the transaction: the debt bonâ fide due to the defendant from *Stelfox* was 300*l.*; the goods conveyed, after satisfying the extent of the crown, were worth no more; the defendant declared before the execution of the bill of sale that he should immediately put it in force, and he did so as soon as it was executed. In *Wilson* v. *Day* (*b*) the principal stress was laid on the circumstance that there was no alteration of the possession after the execution of the deed conveying away the trader's property, which was considered as a badge of fraud; and so it was in *Law* v. *Skinner*. (*c*) In *Butcher* v. *Easto* (*d*) the security was not given to the creditor who made the arrest; and Lord *Mansfield* laid stress on this, that the trader must have contemplated at the very time the act of bankruptcy which he committed within twenty-four hours afterwards. And *Compton* v. *Bedford* (*e*) also went on that ground. As to the bill of sale sweeping away the whole property of the trader, the same effect would have been produced if the defendant's suit had proceeded to judgment and execution, to which no objection could have been made: and it would be absurd that the resistance of a trader to a just suit should give the creditor an advantage.

Richardson, in reply, insisted that the very bill of sale itself, independent of any collateral circumstances, was a fraud upon
[143] the bankrupt laws; but if any such were wanting it would be

(*a*) 1 *Burr.* 474. (*b*) 2 *Burr.* 827. (*c*) 2 *Blac.* 996.
(*d*) *Doug.* 294. (*e*) 1 *Blac.* 362.

found

found in the fact stated that *Stelfox* knew at the time of giving the bill of sale that he was in insolvent circumstances, and therefore he must have intended to give the defendant a preference over his other creditors. The defendant likewise must have known that by taking such a bill of sale the insolvency of the debtor must necessarily ensue, as he could no longer carry on his trade. There is no necessity for fraud in fact; for in *Wilson* v. *Day* (*a*) Lord *Mansfield* considered the deed to be very fair as between the parties; and fraudulent and void only as it tended to defeat the system of the bankrupt laws.

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Lord ELLENBOROUGH C. J. This question arises upon the validity of a deed of sale of all his goods and stock in trade made by a trader under arrest at the suit of the vendee, there being then another writ out against him at the suit of another creditor. The trader was in insolvent circumstances, and known to himself to be so at the time. Now the execution of such a bill of sale, under these circumstances, has in all the cases been considered, primâ facie at least, as fraudulent; and it is incumbent on the party who sets it up to shew something to rebut that presumption. As a general proposition it cannot be disputed that a conveyance by deed by a trader of all his property to a particular creditor in prejudice to the rest is an act of bankruptcy. Every man must be taken to contemplate the ordinary consequences of his own act at the time of the act done. Here the necessary effect of the act done was to turn round all his other creditors, and prevent them from pursuing their present ordinary remedy against him for the payment of [144
their demands, leaving them only to look to him for the future surplus, if any. Being insolvent within his own knowledge at the time, and two writs out against him, he must have contemplated bankruptcy by means of arrest and lying in gaol two months; and under these circumstances he gives the bill of sale to one of his creditors, conveying all his property. Must he not then have contemplated the necessary consequence of his own act? And as such an act must have the effect of defeating or delaying all his other creditors, by stripping him of all he had and disabling him from carrying on his trade, must I not deduce the inference from it that he meant to defraud all his other creditors. This then constitutes an act of bankruptcy,

(*a*) 2 *Burr.* 830.

and

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and cannot be distinguished in principle from the case of *Butcher* v. *Easto*, where the same thing was done in effect: for the bill of sale was there given under the pressure of legal process, though not at the suit of *Easto*, who redeemed the trader from the arrest of another creditor by becoming bail for him. This is not like a partial conveyance only of a trader's property, which is open to a different consideration.

GROSE J. When a trader disposes of all his property to a particular creditor, it must necessarily defeat all his other creditors of recovering their just debts: the law therefore considers the deed as fraudulent and void. This is distinguishable from cases where he conveys only a part of his property.

LAWRENCE J. As the necessary consequence of this deed of conveyance was to take the whole effects of the trader, which [145] the law says shall be distributed equally amongst all the creditors, and to give them to a particular creditor, this within all the cases is an act of bankruptcy: and it is not less the grant or conveyance of the bankrupt to the prejudice of his other creditors, because at the time he made it he was under arrest at the suit of the defendant.

LE BLANC J. The principle of all cases is, that if the conveyance to a particular creditor *necessarily* prevent the property of the trader from being distributed as the law requires in cases of bankruptcy, that is itself an act of bankruptcy. But this is attempted to be distinguished from the general case, upon the ground that the security was given to the particular creditor at a time when he held the trader under arrest. But I cannot distinguish this in principle from *Butcher* v. *Easto*. There the security was given by the trader when under arrest; and though not to the particular creditor who had arrested him, yet to another creditor by whose means he was liberated, and who on that condition became bail for him. And that, having been determined to be an act of bankruptcy, does away the only distinction which is pretended between this and the general class of cases where a conveyance of all a trader's effects to a particular creditor has been uniformly holden to be an act of bankruptcy.

Postea to the Plaintiff.

The KING *against* WOODCOCK.

Wednesday, Jan. 29th.

A Conviction on the malt act, 42 *Geo.* 3. *c.* 38. *s.* 30. stated that *on the 29th of May* 1805 an information was exhibited before *A. B.* and *C.*, three justices of the peace in and for the county of *Suffolk*, by *R. P.* officer of excise, who informed the said justices that the defendant was a maltster at *H.* in the said county, " and so being there such maltster, he, the defendant, *within three months now last past, viz. on the* 22*d of* May *now last past*, at *H.* aforesaid, did wet certain corn of him the defendant then and there making into malt, in a certain stage of operation, (and so set out an offence within that act), (*a*) contrary to the form of the statute; for which the defendant hath forfeited 200*l.*" &c. The conviction then set out the summons to the defendant to appear, the evidence, and other proceedings, and concluded with the adjudication of conviction. But in setting out the evidence of the offence it was only stated that the witness deposed " that the defendant at the time of the committing the offence mentioned in the said information was a maltster at *H.* &c. That the witness *on the* 22*d of* May (not stating in what year) went to the defendant's malt-house at *H.* aforesaid, where he found a floor of malt then in operation," &c. (and so proceeded to state the fact of the offence.)

Alderson, amongst other things, objected that the evidence, as set forth, did not shew an offence committed within the time limited for the prosecution. To which

**Freere*, in support of the conviction, answered, that it was expressly so stated in the information, to which the evidence must be taken to refer; and that unless the justices had been satisfied that the witness was speaking of the 22d of *May* 1805, they would not have convicted the defendant: and this was a conclusion of fact which it was competent for them to draw from the evidence stated. But by

Lord ELLENBOROUGH C. J. The evidence ought to appear to support the information, and the justices should either have

Where a penalty is to be sued for before justices of peace within a certain time after the offence committed, upon a conviction for such offence returned by certiorari into *B. R.* it ought to appear on the face of the evidence stated in such conviction that the prosecution was in time; and if the witness be only stated to have mentioned the month in which the offence was committed, *omitting the year*, and there be no word of reference to connect it with the true date, the omission cannot be supplied either by reference to the offence charged in the information, or by presumption arising from the justices having convicted the defendant.

(*a*) Vide *Rex* v. *Skone*, 6 *East*, 514.

stated

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stated the evidence of the witness to be that the offence was committed on the 22d of *May* 1805, if they really so understood the witness to mean: or if they had any doubt of that, they should have enquired of him more particularly as to the date of the fact. But here the date of the year neither appears expressly by the evidence, nor by any words of reference to any other date which is certain. And if they have done their business slovenly, we cannot supply their omission. As it stands on the conviction, the offence does not appear to have been committed within three months before the prosecution commenced, which is necessary to give them cognizance of it.

The other Judges concurring on this ground,

Conviction quashed.

Friday, Jan. 31st.

*SCHOLEY and DOMVILLE *against* MEARNS.

To a debt on a bail-bond, it is no good plea that the action was brought by the sheriff for the benefit of and as trustee for the sheriff's officer, who arrested the defendant, and to whom the defendant paid the debt and costs, &c. after the return day, but *before the sheriff was ruled to return the writ;* and who accepted the money so paid by the defendant *in full satisfaction and discharge of the bail-bond and fees*, &c. and that if any damage were afterwards incurred for default of the defendant's appearance according to the condition of the bond, it was occasioned by the default of such sheriff's officer in not paying over the debt and costs to the plaintiff in the original action, which would have been accepted by such plaintiff, &c.: for it does not thereby appear that the sheriff's officer had either a *legal* or an *equitable* interest (even supposing the latter would have sufficed,) in the bond *at the time of the supposed satisfaction* received by such officer; and supposing that accord and satisfaction could be pleaded to such a bond, not for *money* but for a *collateral act*; and supposing that it could be so pleaded *after* the day stipulated for performance of the act.

THE Plaintiffs declared in debt on a bail-bond to them as sheriff of *Middlesex*, in 40*l.* The plea, after craving oyer of the bond and condition, (which was for the appearance of the Defendant in *B. R.* on *Wednesday* next after 15 days of *Easter*, to answer *G. Loveday* in a plea of trespass, and also to a bill against the defendant for 50*l.* on promises, &c.) stated that the defendant ought not to be charged, &c.; because the action was brought and prosecuted by the plaintiffs *for the use and benefit of one* J. Simpson, *and as trustee for him*, and not for their own use or benefit; and that before the making of the bail-bond, viz. on the 29th of *March* 1805, at, &c. the

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defendant was arrested by the said *J. Simpson*, one of the bailiffs of the plaintiffs as sheriff of *Middlesex*, by virtue of a bill of *Middlesex*, before issued out of *B. R.* at the suit of the said *Loveday* against the defendant, and returnable on *Wednesday* next after 15 days of *Easter* then next, and which precept was indorsed for bail for 20*l.* and by virtue of a certain warrant of the said sheriff for executing the said precept, and directed to the said *J. Simpson*, as one of his bailiffs, and which was also indorsed for bail for 20*l.* That the defendant, being so arrested, gave the bail-bond in question, conditioned for his appearance according to the tenor of the said precept; and that having been so arrested by the said *J. Simpson*, as such bailiff of the said sheriff, the defendant afterwards and before the return of the said precept, viz. on the said 29th of *March* 1805, at, &c. *paid to the said* J. Simpson 22*l.* for the debt and costs in the action by *G. Loveday* against him, and for the fees and expences of the arrest, bail-bond, and other charges; and that afterwards and before the return of any rule of the Court of *B. R.* upon the sheriff to return the writ, and before the commencement of this suit, viz. on the 2d of *May* 1805, the defendant *paid to* J. Simpson, *as such bailiff*, &c. the further sum of 5*l.* for the debt and costs in the said action, and for the fees, expences, and charges of the arrest, bail-bond, and damages, &c. making in the whole 27*l.* which sum was at the time the same was so paid fully *sufficient to pay and satisfy the said* G. Loveday, the plaintiff in the said suit, the debt and costs, &c. and fees, costs, and expences of the said arrest, &c. and all proceedings had thereon, &c.; and *which sum of* 27*l. so paid* in manner aforesaid, *the said* J. Simpson, *then and there accepted of and from the defendant in full satisfaction and discharge of the bail-bond, and of all damages and cause of action in respect thereof:* And that if any damage or expence has accrued or been incurred by reason of the defendant's not appearing in the said court, &c. according to the condition of the bail-bond, and the exigency and tenor of the said precept, subsequent to the payment of the said 27*l.*, *the same was occasioned by the default of the said* J. Simpson, *not paying over to the plaintiff in the action, or his attorney, the amount of the debt and costs which would have been taken and accepted by the said plaintiff or his said attorney, and sufficient to pay which, over and besides such fees, expences, and charges as aforesaid, had been so paid by the* defendant

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ant to the said *J. Simpson* as aforesaid, &c. To this there was a demurrer, assigning for special causes, that no competent discharge by the plaintiffs of the bail-bond* or condition thereof, nor any legal satisfaction of the same to them is stated in the plea. That it is not thereby shewn at what time or place, or under what circumstances the plaintiffs became or were trustees for *J. Simpson*, or where or in what manner *J. Simpson* became entitled to any benefit from the bail-bond; and that it is not alleged that he had any beneficial or other interest in the same at the time of his acceptance of the money supposed by the plea to have been paid to him in satisfaction and discharge thereof. And that if even *J. S.* were at that time interested in such bail-bond no sufficient discharge thereof by him or satisfaction of the same to him in law is shewn, &c. Joinder in demurrer.

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Marryat in support of the demurrer. 1st, This is not a bond for the payment of money, but for the doing a collateral act on a certain day, which bond became forfeited, because the time passed without the defendant having done the act. And a bond for doing a collateral act can only be discharged by deed or by performance: though if the bond be for money, then by accord before the day any thing else may be received in satisfaction. This distinction is fully established in *Peytoe's* case, (*a*) *Anon. Dy.* 1. and *Preston* v. *Christmas*. (*b*) 2dly, Supposing the defendant could plead satisfaction before the breach, yet satisfaction afterwards cannot be pleaded. *Cro. Eliz.* 46. Now here it is only alleged that the two payments combined amounted to satisfaction, one of which appears to have been made after the return of the writ. Before the stat. 4 *Ann. c.* 16. *s.* 12. payment after the day of the principal and interest due by the condition of the bond could not be pleaded in bar to the action.

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3dly, This is not pleaded as accord and satisfaction, or even agreement for satisfaction with the sheriff, to whom the bond is given, but with *Simpson*, the bailiff; who does not appear to have had any original interest in the bond, nor does it appear that the plaintiffs were trustees for him when it was given, but only that the action is *now* brought for his benefit. But if *Simpson* could not have released the bond, it is clear that he could not accept satisfaction for it. And that he could not have released the bond, though given for his use, was decided in

(*a*) 9 *Rep.* 77. *b.* (*b*) 2 *Wils.* 87. Vide *Rogers* v. *Payne*, *ib.* 376.

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Offly v. *Warde* (*a*) and *Scudamore* v. *Vandenstene*. (*b*) And he observed that no injustice could ensue here, as the Court exercised an equitable summary jurisdiction over their officers in these cases, in directing bail-bonds to be delivered up to be cancelled if the bail were entitled to relief: but this was an attempt, as was said by *Buller* J. in *Donnely* v. *Dunn*, (*c*) to set up as a legal defence that which rather belonged to what might be called the equity side of the court.

Espinasse, contrà. The plaintiffs, by the demurrer, admit that the action is brought by them as trustee for their bailiff and for his use; and then the case of *Bottomley* v. *Brook* (*d*) is in point to shew that a plea to an action on a bond, that it was given to the plaintiff in trust for another, so as to let the defendant into a defence which he had against the cestui que trust, is good, and the same case shews that it is not necessary to set forth how the plaintiffs are trustees; for the plea there was general. Besides, a party is not supposed to be cognizant of his adversary's title in all particulars: therefore in covenant against an assignee, it is always sufficient for the plaintiff to declare that [152] the premises came to the defendant *by assignment*, without shewing how. The plea then states further, that the defendant was arrested under a writ directed to the plaintiffs as sheriff, and a warrant made by them to the officer, for whom it is averred that they are suing as trustees; and that before the sheriff was ruled to return the writ, and consequently (by adverting to the law and practice of the Court, of which the Court now will take notice) before the sheriff had become liable to the plaintiff in the original action, the whole debt, costs, and expences, amounting to 27*l.*, were paid to the plaintiff's own officer; which sum was accepted by such officer in full satisfaction of the original plaintiff's demand, and in discharge of the bail-bond; and that if any subsequent loss accrued by reason of the defendant's non-appearance, it was occasioned by the bailiff's own default, as trustee for whom the plaintiffs are admitted by the demurrer to sue. In many instances the Court takes notices of sheriffs' officers as servants for whose acts the sheriff is answerable in the execution of his duty, and of whom he takes security. The Court will also take notice that the real

(*a*) 1 *Lev.* 235. (*b*) 2 *Inst.* 673. (*c*) 2 *Bos. & Pull.* 47.
(*d*) *M.* 22 *Geo.* 3. *C. B.* cited in *Winch* v. *Keeley*, 1 *Term Rep.* 621.

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object of a bail-bond is to indemnify the sheriff against the payment of the plaintiff's debt in case the defendant does not appear at the return of the writ; which by the practice of the Court is extended to a future day, before which the satisfaction was accepted: and it is clear that the acceptance of a lesser sum *before* (*a*) the day is a good satisfaction of a bond, which this must in substance be taken to have been.

[153] *Marryat* said, that the cases of *Bottomley* v. *Brook*, and *Rudge* v. *Birch*, (*b*) had been since over-ruled in a case of *Lane* v. *Chandler* in the Exchequer.

Lord ELLENBOROUGH C. J. If we were to take notice of such a defence as this, there would be an end at once of the simplicity of the common law, and of all the distinctions between law and equity. Is it not decisive in this case that the officer could not have released the bond; and if he could not release, how could he accept any thing in satifaction of it? The remedy must be sought in another way. The statute (*c*) which makes bail-bonds assignable to the plaintiff in the action would have been unnecessary if before that the bond was generally assignable at law. This is not brought within any of the cases; for in those which have been referred to it was at least alleged that the bond was originally given in trust for the party against whom the cross-demand was set up; but it is not alleged here that the bond was originally given to the sheriff in trust for the officer by whom satisfaction is averred to have been received, nor does it appear how he afterwards came to have any equitable interest in it. But supposing that the circumstances disclosed could have operated as satisfaction of the bond to the sheriff, then the plea is ill conceived, for it should have been pleaded as satisfaction to the sheriff. So that in no view of the case can the plea be sustained.

LAWRENCE J. (*d*) declared himself of the same opinion, and animadverted upon the experiment made in this case, of pleading

[154] matter as a defence at law, which, as was observed by Mr. Justice *Buller* in the case mentioned, was nothing more than the equitable practice of the Court in exercising a summary jurisdiction over its officers.

LE BLANC J. This does not come within any of the cases

(*a*) *Pinnel's* case, 5 *Rep.* 117.

(*b*) *M.* 25 *Geo.* 3. *B. R.* cited also in 1 *Term Rep.* 622.

(*c*) 4 *Ann. c.* 16. *s.* 20. (*d*) *Grose* J. was absent.

which

which have been determined; for it does not appear that the officer had even any equitable interest in the bond at the time of the supposed satisfaction made to him in discharge of it.

Judgment for the Plaintiffs.

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Friday, Jan. 31st.

IN assumpsit for money had and received by the Defendant for the use of the Plaintiffs, as assignees of *Wardell*, to which the general issue was pleaded, a verdict was found for the plaintiffs for 367*l.* 16*s.* 6*d.* before Lord *Ellenborough* C. J. at the Sittings at *Guildhall* after last *Trinity* term, subject to the opinion of the Court upon the following case.

A creditor for goods sold and delivered to a trader who had committed a secret act of bankruptcy, not being cognizant thereof, attached money of the trader's in the hands of a third person, and recovered judgment in the Mayor's Court of *London* against the *garnishee who* thereupon *paid* him the amount of the debt so attached; afterwards a commission issued; held that this payment was not protected by the

In *Nov.* 1802 *Wardell*, being a trader, became indebted to the defendant in 367*l.* for goods sold and delivered, and on the 27th of *Jan.* 1803 set sail in a ship of which he was the sole owner, with a cargo for the *West Indies*, having only a few days before committed a secret act of * bankruptcy. In *July* 1803 insurances to the amount of 3400*l.* were effected for the bankrupt by Mr. *De Beaume*, a policy-broker residing in *London*, and in the same month the ship and cargo were captured by the *French*. On the 20th of *Jan.* 1804 the defendant brought an action in the Mayor's Court of *London* against the bankrupt, and attached 367*l.* in monies numbered in the hands of *De Beaume*, who had received the amount of the policies of insurance from the underwriters: and the defendant having, on the 28th of the same month, obtained a regular judgment by default in that action, received 367*l.* from *De Beaume*. The bankrupt returned to *England* in *Feb.* 1804, and on the 9th of *March* following a commission of bankrupt was issued against him, under which the plaintiffs were chosen assignees, and an

stat. 19 *Geo.* 2. c. 32. not being a payment made *by the bankrupt* in the usual and ordinary course of trade and dealing; and held that the assignees of such bankrupt, under a *third* commission issued against him, might sue for and recover back such payment, although the bankrupt, who had obtained his certificate, under his former commissions had not paid 15*s.* in the pound under the second of them; in which case his future effects remain liable to that extent to his creditors under the second commission respectively.

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assignment to them was regularly executed. *De Beaume* retained from the plaintiffs, as such assignees, out of the monies he had collected on the policies the amount of the payment he had made to the defendant. *Wardell* had been a bankrupt twice before, (viz.) once in the year 1786, and again in the year 1788; and had obtained his certificate under those commissions, but had not paid a dividend of 15*s.* in the pound under the last of them; and his creditors at that time still remain unsatisfied. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If the Court should be of opinion that the plaintiffs were entitled to recover, the verdict was to stand: if not, a nonsuit was to be entered.

Sedgwick, for the plaintiffs, made two questions. 1st, Whether the judgment under the foreign attachment authorized the
[156] retaining by the defendant of the money paid to him by *De Beaume* out of the property of the bankrupt? 2d, Whether the non-payment of 15*s.* in the pound under the second commission against the bankrupt prevented the vesting of the property in his possession at the time of the third commission in the plaintiffs who were the assignees under such third commission? 1st, The property of a bankrupt vests in his assignees by relation of law from the act of bankruptcy: which relation is founded upon the policy of the bankrupt laws to avoid fraud and to promote an equal distribution of the property amongst all the creditors. Here the act of bankruptcy was before the 27th of *Jan.* 1803, and it was not till *July* of the same year that the policies were effected; at that time, therefore, the ship and goods were by relation of law the property of the assignees, and not of the bankrupt: and it was not competent for him to dispose of the proceeds of those policies in the event of a loss otherwise than by one of the modes of payment excepted by the statutes (*a*) the only one of which applicable, if at all, to the present case is by the stat. 19 *Geo.* 2. *c.* 32. which enacts that, after a secret act of bankruptcy, "no creditor of a "bankrupt, for or in respect of goods bona fide sold to such "bankrupt, or for or in respect of any bill of exchange bona "fide drawn, negociated, or accepted by such bankrupt *in the* "*usual or ordinary course of trade and dealing*, shall be liable to

(*a*) These are severally referred to in the argument of the case of *Copland* v. *Stein*, 3 *Term Rep.* 201.

"refund

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" refund to the assignees, &c. any money which before the " suing forth of such commission was really and bonâ fide, " *and in the usual and ordinary course of trade and dealing* " received by such person of any such bankrupt, before * such " time as the person receiving the same shall know, understand, " or have notice that he is become a bankrupt, or that he is in " insolvent circumstances." Now money paid under a judgment recovered can in no sense of the words be deemed to be a payment *in the usual and ordinary course of trade and dealing*, but the very reverse of it: because it is in default only of such a payment as is described in the statute that recourse is had to the compulsory process of the law. That the words of the statute have always been construed strictly appears from *Bradley* v. *Clark*, (*a*) where money paid by the bankrupt after a secret act of bankruptcy to a carrier for the *carriage* of goods not being for the goods themselves, was holden not to be a payment protected by the act; and *Copland* v. *Stein*, (*b*) where money advanced by a factor on the security of the bankrupt's goods could not be retained. Even a payment upon a bill of exchange, *if time be given*, takes it out of the statute, by reason of the words *in the usual and ordinary course* of trade and dealing. (*c*) It makes no difference that a commission of bankrupt was not issued at the time of the payment received, because it is sufficient to avoid it if the creditor do but understand that the trader is in insolvent circumstances; and the very fact of being obliged to sue for the recovery of a just debt affords an inference that the creditor must know or understand that the trader is in insolvent circumstances. In *Hunter* v. *Potts*, (*d*) money of the bankrupt attached in a foreign country, to which the bankrupt laws did not extend, was yet recovered back by the assignees. And in *Sill* v. *Worswick*, (*e*) it was so recovered back, though attached by the creditor abroad before the assignment under the commission at home. [*Le Blanc* J. Both those were cases of creditors who were cognizant of the bankruptcy, and who proceeded against the bankrupt's property abroad in order to get a preference, in fraud of the bankrupt laws, by which they were bound.] At the time of the judgment re-

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(*a*) 5 *Term Rep.* 197.
(*b*) 8 *Term Rep.* 199.
(*c*) *Vernon* v. *Hall*, 2 *Term Rep.* 648.
(*d*) 4 *Term Rep.* 182.
(*e*) *H. Blac.* 665.

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covered, however, in the Mayor's Court, the property attached by the defendant, as belonging to the bankrupt, was the property of the assignees, who were no parties to the suit, and could not be affected by that judgment. 2dly, As to the title of the assignees under the third commission to sue, that depends on the stat. 5 *Geo.* 2. *c.* 30. *s.* 9., which enacts, "that in case "any commission of bankrupt shall issue against any person "who shall have been discharged by virtue of that act, or shall "have compounded, &c. the *body* of such person conforming "as aforesaid shall be *free from arrest* and imprisonment by "virtue of this act: but the *future estate and effects* of every "such person *shall remain liable to his creditors*, as before the "making of the act; unless the estate of such person, against "whom such commission shall be awarded, shall produce clear, "after all charges, sufficient to pay every creditor under the "said commission 15*s. in the pound* for their respective debts." The statute makes no actual transfer of the bankrupt's after-acquired property, but only makes his future effects liable as before the granting of the certificate under the second commission. Those claims, however, are left to be enforced at law by each particular creditor; each must sue for himself, (*a*) and appropriates to his own use what he recovers, without accounting to the other creditors: for after a certificate allowed under the second commission the assignees, as such, have no further claim to after-acquired property: for they can only claim in trust for all the creditors. Besides, after an interval of so many years, the statute of limitations has run upon all the prior debts.

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The Court were all clear upon this point with the plaintiffs, that the future estate of the bankrupt only remained liable to the claims of his individual creditors under the second commission, not having received 15*s.* in the pound, which they might respectively sue for as in other cases; but that it could not prevent the vesting of the bankrupt's estate in the assignees under a third commission for the benefit of all the creditors.

Jervis contrà. The principal question is, Whether the payment to the defendant by *De Beaume*, under the judgment of the Mayor's Court, out of the bankrupt's estate, attached in his hands, be protected by the stat. 19 *Geo.* 2. *c.* 32. *s.* 1.? This

(*a*) Vide *Philpot* v. *Cordeu*, 5 *Term Rep.* 287.

is

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is remedial law, made to protect persons receiving payments from traders for goods sold and delivered, or upon bills of exchange *in the usual and ordinary course of trade and dealing*, before notice of their bankruptcy or insolvency. It ought therefore to receive a liberal construction, to promote the remedy in favour of the bona fide creditor. Here the debt arose for goods sold and delivered in the course of trade; which is one of the cases provided for by the statute; and the defendant was ignorant of the secret act of bankruptcy committed by *Wardell* when he received payment of his debt. If he had received it from *Wardell* without the compulsion of process, no doubt the payment would have been protected: and the sanction of a court of justice ought not to invalidate it. Payments by compulsion [160] of process have been holden to be within the act in several cases. *Calvert and others, Assignees of Jones* v. *Linguard and Sadlier*, (*a*) *Holmes and Another, Assignees of McDougal* v. *Wennington*, (*b*) and, finally, in *Cox* v. *Morgan*, (*c*) by a majority of the Court, after full consideration. [Lord *Ellenborough* C. J. adverted to the ground on which *Chambre* J. had differed in that case, that so far from being a payment "in the usual and ordinary course of trade and dealing," as the statute requires, it was the reverse; for the payment was obliged to be compelled, because it could not be obtained in the usual and ordinary course. And he added that it was by no means a clear case.] He then adverted to the arguments of the two other Judges in that case in support of the payment. Then, if payment under an arrest be within the statute, payment under a judgment and execution cannot be less so, without introducing the greatest absurdity and incongruity in the proceedings of the law. Even upon the words of the act a payment enforced by legal process cannot be said to be *unusual* and *extraordinary*; and if this be not within the act, it will be difficult to draw the line: a menace of process may equally be said to take the payment which ensues upon it out of the *usual and ordinary course*, &c. and questions will arise whether the terms, the tone, or occasion

(*a*) Sittings before Lord *Loughborough*, in 1788, cited in *Bradley* v. *Clarke*, 5 *Term Rep.* 200. and also in 2 *H. Blac.* 335. and said by *Rooke* J. in *Cox* v. *Morgan*, 2 *Bos. & Pull.* 411. to have been afterwards heard in *C. B.* upon a motion for a new trial.

(*b*) Cited 5 *Term Rep.* 200. and a full note of it in 2 *Bos. & Pull.* 399.

(*c*) 2 *Bos. & Pull.* 398.

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of the demand imply a menace, till the act be frittered away. And at least it is clear that the stat. 21 *Jac.* 1. *c.* 19. *s.* 9. which * says, "that all creditors having *security* for their debts by judgment, &c. or having made attachments in *London*, &c. whereof there is *no execution, &c. served and executed* before the party shall become bankrupt, &c. shall not be relieved upon any such judgment, attachment, &c. for more than a rateable part of their debts with the other creditors," does not apply; for as that does not extend to judgments upon which executions have been executed, which cannot be overhauled by the assignees of the debtor under a commission sued out upon a prior act of bankruptcy; (*a*) so neither, by a parity of reason, can it be extended to judgments upon which the debts have been paid without any writ of execution: for in neither case can it be said that the judgment remains as a security. None of the cases apply where the payments were ruled to be out of the statute of *Geo.* 2. *Bradley* v. *Clark* (*b*) was a payment for the carriage of goods, not for the goods themselves. In *Vernon* v. *Hall* (*c*) time had been given on the bill of exchange, which converted it into a loan. And in *Hunter* v. *Potts*, (*d*) and *Sill* v. *Worswick*, (*e*) the creditors who received payments were cognizant of the bankruptcy of their debtors. And perhaps in all cases where a commission has been taken out, notice of which is always inserted in the *Gazette*, the creditors of the bankrupt may be bound to take notice of it. [Lord *Ellenborough* C. J. That is a circumstance from whence the jury may presume notice, but it is not in itself actual notice.] The several cases of *Solomons* v. *Ross*, (*f*) *Jollet* v. *Deponthien*, (*g*) and *Neale* v. *Cottingham*, (*h*) appear to have turned on the circumstance of the payments having been made after the commissions sued out. On the second point he waved offering any argument, after the opinion which the Court had intimated.

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Sedgwick, in reply, said that the payment had been made, *not by the bankrupt*, but by a third person; not out of the *bankrupt's* money, but out of the money of the *assignees;* and not in the usual and ordinary *course of trade and dealing*, but under

(*a*) *Foster* v. *Allanson*, 2 *Term Rep.* 479. (*b*) 5 *Term Rep.* 197.
(*c*) 2 *Term Rep.* 648. and vide *Pinkerton* v. *Marshall*, 2 *H. Blac.* 334.
(*d*) 4 *Term Rep.* 182. (*e*) 1 *H. Blac.* 665.
(*f*) Cited in *Folliott* v. *Ogden*, 1 *H. Blac.* 131.
(*g*) Ib. 132. (*h*) ib.

compulsion

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compulsion of process; and therefore was in no respect within the words or meaning of the statute.

Lord ELLENBOROUGH C. J. I think the observation, that this was not a payment *by the bankrupt* at all, is decisive; for the words of the statute are, that no creditor "shall be liable to refund to the assignees any money which before the issuing of the commission was really and bonâ fide, and in the usual and ordinary course of trade and dealing *received* by such person *of any such bankrupt* before such time," &c. If it had been necessary to have decided the question on which the Court of Common Pleas were divided in opinion, in the case of *Cox* v. *Morgan*, I should have wished to have taken more time to consider it, especially as the opinion of the majority of that Court is fortified by antecedent cases; though I confess that at first sight of the statute I should be more inclined to the construction put upon it by the single Judge. But there is no necessity for us to determine whether that case were rightly decided by the majority. For whether or not money received by a creditor under the compulsion of process can or cannot be said to be received by him *in the usual and ordinary course of trade and dealing*, at least it must be received *of the bankrupt* to bring the case within the statute; the payment must be made by the bankrupt, or if not by his individual hand, at least by some agent of his, acting by his authority. But how can a payment extorted by compulsion of legal process, from one who happened to have effects of the bankrupt in his hands at the time, be said to be a payment *by the bankrupt*, who was not even conscious of the fact? Therefore, without going more at large into the question, it is sufficient to dispose of this case by saying that it neither comes within the words nor the meaning of the statute.

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LAWRENCE J. (*a*) This cannot be said to be a payment *by the bankrupt*, even under the compulsion of process; for the bankrupt could not even know that the money belonging to him was in the hands of the person at the time by whom the payment was in fact made.

LE BLANC J. This is very different from cases of payments made by a person entrusted by the bankrupt with the disposition of his property, or by his direction, which may be considered

(*a*) *Grose* J. was absent from indisposition.

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as payments made by him in the usual and ordinary course of trade and dealing. But it is very difficult to say that a payment made by a third person, without the knowledge of the bankrupt, without his even knowing that his property was in the hands of such third person, is a payment, in the usual and ordinary course of trade and dealing, by the bankrupt himself.

Postea to the Plaintiffs. (*a*)

(*a*) See the next case.

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Friday, *Jan.* 31st.

HOVIL and Others, Assignees, &c. of WARDELL, a Bankrupt, *against* PACK and Another.

A trader indebted to the defendants, after a secret act of bankruptcy, gives them a new bill in lieu of their former claim, and deposits with them certain policies of insurance made on his account, as collateral security. And after notice of a loss upon those policies, the policy broker, at the bankrupt's request gives his own acceptance to the defendants, (which was afterwards paid,) in order to induce them to give up their lien on the policies; after which a commission of bankrupt having issued against the trader on the prior act of bankruptcy; held that the assignees could not recover from the defendants the amount of the broker's acceptance paid to them, which was the money of the broker, and not of the bankrupt, though the broker, in settling his account with the assignees, retained the amount of the money so paid by him to the defendants, in order to get the policies out of their hands.

ASSUMPSIT for money had and received by the Defendants for the use of the Plaintiffs, as assignees of *Wardell*, the bankrupt. Plea, non assumpsit. At the trial before Lord *Ellenborough* C. J. at the Sittings at *Guildhall* after last *Trinity* term, a verdict was found for the plaintiffs for 230*l.*, subject to the opinion of the Court upon the following case.

In *November* 1802 *Wardell*, being a trader, indorsed a bill of exchange, which would become due on the 8th of *Feb.* 1803, and which, in *Dec.* 1802, was indorsed over to the defendants for a valuable consideration. On the 27th of *Jan.* 1803 *Wardell* sailed in a ship, of which he was the sole owner, with a cargo for the *West Indies*, having only a few days before committed a secret act of bankruptcy. The bill was refused payment when due, and notice thereof given to the proper parties. In *July* 1803, the bankrupt's wife caused insurances to the amount of 3400*l.* on the ship and cargo to be effected for the bankrupt by Mr. *De Beaume*, a policy broker residing in *London*, and who delivered them to Mrs. *Wardell* without being paid

the

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the premiums. Mrs. *Wardell* soon afterwards applied to the defendants, whose debt was still unpaid, and who had brought an action against the drawer of the bill above-mentioned, and obtained judgment by confession in such action, to take another bill for payment of the amount of the first, which she indorsed * as attorney for her husband, and to stay execution until such second bill should become due: and as an inducement to them to do so, offered to deposit the policies with them as a security for the payment of such second bill. This the defendants agreed to, and the policies were accordingly deposited with them. In *July* 1803 the ship and cargo were captured by the *French*. On receiving intelligence of the capture, Mrs. *Wardell* applied to the defendants to deliver up the policies, for the purpose of receiving the amount of the subscription; which they refusing to do without security for payment of their debt, (the second bill having also been dishonoured,) *De Beaume*, at her request, accepted a bill of exchange at one month for 230*l.* the amount of the defendants' debt; and the policies upon this were, at the request of Mrs. *Wardell*, delivered up to him. This bill was regularly paid when due by Mr. *De Beaume*, who had received the amount of the policies of insurance from the underwriters. The bankrupt returned to *England* in *February* 1804; and on the 9th of *March* following a commission of bankrupt was issued against him, under which the plaintiffs were chosen assignees, and an assignment to them was regularly executed. *De Beaume* retained from the plaintiffs as assignees, out of the monies he had collected on the policies, the amount of the payment he had made to the defendants. *Wardell* had been a bankrupt twice before, once in the year 1786, and again in 1788, and had obtained his certificate under each of those commissions, but had not paid a dividend of 15*s* in the pound under the last, and his creditors at that time still remain unsatisfied. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If they were, then the verdict was to stand; if not, a nonsuit was to be entered.

Sedgwick, for the plaintiffs, conceived that the determination in the last case in favour of the plaintiffs' right to sue, which had been abandoned in argument, concluded the present question. But by

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Lord

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Lord ELLENBOROUGH C. J. If you adopt *De Beaume* as your agent on your own behalf, you must adopt him throughout, and take his agency *cum onere*. Your action, if any, must be against *De Beaume:* but it is impossible you can follow the money into the hands of the defendant, to whom it has been paid by your adopted agent. If this could be done, by the same rule you might follow it still further through other hands. But if the defendants had paid it over to another, could you pretend to have the same right to follow it?

LAWRENCE J. (*a*) The facts are, that the defendants having a demand upon the bankrupt upon a certain bill, his wife prevailed upon them to give it up, and to take another bill for the amount, and deposited the policies of insurance, which she had procured from *De Beaume*, in their hands as a security. When she applied to them to deliver up the policies, for the purpose of obtaining payment from the underwriters, they refused unless upon receiving security for the payment of their
[167] debt. This security was given by *De Beaume*'s acceptance, which he afterwards paid: the money, therefore, which the defendants have received, and for which the assignees of the bankrupt have brought this action, was the money of *De Beaume* and not of the bankrupt; and therefore the assignees can have no title to recover it.

LE BLANC J. *De Beaume* must have paid his acceptance to the defendants whether he had ever received the amount of the loss on the policies from the underwriters or not. The payment therefore was made by him out of his own money.

Gaselee was to have argued for the defendants.

Postea to the Defendants.

(*a*) *Gross* J. was absent from indisposition.

The

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The KING *against* The Inhabitants of MERSHAM.

Saturday, Feb. 1st.

TWO Justices by an order removed *Rd. Wraith*, his wife and children by name, from the parish of *Boxley* to the parish of *Mersham*, both in the county of *Kent*. The Sessions, on appeal, confirmed the order; subject to the opinion of this Court on the following case.

The appointment of a master of a workhouse by the parish officers and vestry, pursuant to the stat. 9 *Geo.* 1. c. 7. which enables the parish officers and parishioners, &c. to *contract* with any person for the management of the poor in the workhouse, (and who did contract with the pauper to manage the poor in the workhouse, and teach the children to spin, &c. at a yearly salary, and after some years' service dismissed him at a quarter's notice,) is not a *public annual office or charge* within the st. 3 *W. & M.* c. 11. *s.* 6. the executing of which for a year will confer a settlement.

Previous to the year 1800 the pauper's settlement was at *Mersham*. Some time in that year being informed that a master of the workhouse in the parish of *Boxley* was wanted, he applied for that appointment, and was desired to send in his proposals, and a certificate of his character to the weekly vestry of the parish. He attended at such vestry, and after some inquiries he was desired to retire that his proposals might be considered. *Shortly afterwards he was informed that his proposals were accepted, and his character approved of; and he was desired to attend a subsequent vestry to receive his appointment. He attended accordingly; but there being only a very small attendance of the inhabitants at that vestry, his appointment was postponed to a vestry to be holden on the following *Sunday*, when he attended; and there being twelve of the inhabitants present, he was informed by the parish officers that he was appointed master of the workhouse of the parish of *Boxley*, at a salary of 16*l.* per annum. Nothing was said, either at the time of his appointment or afterwards, as to the time for which he was to hold his situation; but the pauper conceived that he might at any time be dismissed at a quarter's notice. There was no appointment in writing, or any entry in the parish books. He continued master of the workhouse, and resided in the parish of *Boxley*, four years, and during the fifth year was dismissed at a quarter's notice. The duties performed by the pauper were, the superintending and managing the poor in the workhouse, teaching the poor children to spin, weaving himself, and carrying on the manufactures. He carried the accounts quarterly to the overseers. The Sessions were of opinion that the pauper did not gain a settlement in the parish of *Boxley* in consequence of the appointment and service above mentioned.

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Taddy, (and *Berens* was with him,) in support of the order of Sessions, contended that this was not *an office* within the words

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words of the stat. 3 *W. & M. c.* 11. *s.* 6., the service of which within the parish could confer a settlement. The words are, that if any person shall "execute any *public and annual office or* "charge" in the parish for * one whole year, he shall gain a settlement. The word *office*, in its strict sense, being applicable to ancient appointments with a public trust annexed at common law; or such as are expressly made *offices*, by act of parliament; and the word *charge* being used for such public appointments by statute as are in the nature of public *offices* though not expressly declared to be so by name; but having public rights and public duties annexed by law for the breach of which the party is indictable, and not such as merely arise out of contract. It would be very strange and inconsistent if a parish vestry could by their contract with an individual create a new office, which it is said in the books, (*a*) that the king himself cannot do. The cases wherein the service of offices has been holden to give settlements are either of common law offices, such as warden of a borough, (*b*) parish clerk, (*c*) tithing-man, (*d*) constable, (*e*) borsholder, (*f*) bailiff or aleconner, (*g*) and sexton; (*h*) or of officers appointed by statute with public duties to perform, for the due performance of which they are criminally responsible, such as collector of land-tax, (*i*) and collector of the duties on births and burials. (*k*) Now the master of a workhouse cannot be an officer at common law, because all the poor laws are within time of memory. If then he be an officer at all, it must be under one or other of the statutes 9 *Geo.* 1. *c.* 7. *s.* 4. or 22 *Geo.* 3. *c.* 83., both of which were commented upon in the case of *The King* v. *Ilminster*, (*l*) where Lord *Kenyon*, upon the first statement of the case, was of opinion that the governor of the workhouse was no more than in the nature of a servant to the parish officers. But, upon the case going down to be restated, the Sessions precluded the general question by finding the fact that the pauper had served a public annual office in the parish for above a year. The argument in support of the

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(*a*) *Walter Chute*'s case, 12 *Rep.* 116. 2 *Sid.* 141.
(*b*) 10 *Mod.* 13. (*c*) *Salk.* 536. 2 *Stra.* 942. 2 *Sess. Ca.* 182.
(*d*) *Cas. of Set. & Rem.* 72.
(*e*) 2 *Const.* 285. where all these cases are collected.
(*f*) *Burr.* S. C. 223. (*g*) Ib. 366. (*h*) 3 *Term Rep.* 118.
(*i*) 2 *Const.* 283. (*k*) Ib. 284. and 1 *Stra.* 211.
(*l*) 1 *East*, 83.

settlement

settlement turned principally on the *notoriety* of the appointment, and of the service to be performed: but though that would have great weight to prove it a *public* office, if any office at all, yet it could not prove it to be *an office*.

The Court then wished to hear the other side: and Lord *Ellenborough* C. J. asked whether this could be shewn to be any more than a private nomination of the parish officers? That, perhaps, the best criterion for determining whether this man were an *officer* was to consider whether he were indictable for the negligent discharge of the duty which he engaged to perform.

Pitcairn contrà. The pauper received his appointment from the vestry, with the consent of which he was appointed conformably to the direction of the stat. 9 *Geo.* 1. *c.* 7. *s.* 4. that would make it a public independent appointment: the duties to perform are as much of a public nature as those of the overseers of the poor; and the pauper having been appointed at a *yearly* salary, and the duration of his appointment not limited to a less period, it must be taken in point of law, as in the case of a general hiring, to have been an appointment for a year: and the pauper's apprehension can signify nothing. Then the question is, Whether this be not an *office* or *charge* within the meaning of the stat. 3 *W.* 3. *c.* 11. *s.* 6. so as to confer a settlement? If there were any technical meaning attached to the word *office*, at least there is none to the word *charge;* and at any rate this must be deemed to be a *public charge within the parish*. [Ld. *Ellenborough* C. J. asked if there were any case in which the words "public *charge*" had had a sense put upon them distinct from that of "public *office*."] There is no such case: but perhaps the word *charge* was introduced into the statute in order to meet any objection to the technical meaning of the word *office:* the principle of all the several modes of gaining settlements being the notoriety of the party's residence in the parish, which was deemed equivalent to express notice to the parish officers, the original mode of acquiring a settlement. Upon this principle it is that an enlarged construction has always been put upon the statute of King *William*, in not confining the word *office* to *parochial* offices; as in *Bisham* v. *Cook:* (*a*) and the principle of notoriety cannot apply stronger to any case than the present, where the parish collectively have appointed the pauper to execute a public charge in the parish.

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(*a*) 2 *Const.* 214. 1 *Stra.* 411.

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Lord ELLENBOROUGH C. J. The principle on which this mode of gaining a settlement has been given is undoubtedly notoriety to the parish, but a settlement can only be gained in this mode upon the terms of the act of parliament; namely, by executing "a public annual office or charge" in the parish: which brings us back to the question, Whether that which the pauper was appointed to execute were a *public office or charge?* And it appears to me that he cannot be considered as a public officer. An *office* must be derived either immediately or mediately from the crown, or be constituted by statute; and this
[172] is neither one nor the other; but merely arising out of a *contract* with the parish, which the parish officers, with the consent of the parishioners, are by the statute enabled to make with any person for the maintenance and employment of the poor. And it might as well be said that a nurse employed to look after the poor, or any other employed in the like manner to do any part of the parish business, is an officer. The question might admit of a different consideration if any distinction had been established between a public *office* and a public *charge;* but I can find no such distinction, either in any adjudged case or in the sense of the statute. Then again, if this were to be considered as an office or charge, is it an *annual* office or charge? It is said that we are to draw the conclusion that it is so by analogy to constructive hirings for a year: but there are circumstances in this case which repel that presumption, independent of the apprehension of the pauper; for the appointment was determined at a quarter's notice, without objection. Therefore, as far as we can collect the intended duration of the employment from the acts of the parties, it appears that the parish might put an end to it within the year if they thought proper. Upon the whole, therefore, it neither appears to have been an office, nor a public office, nor a public annual office within the statute, and it is immaterial which part of the definition fails in its application to this case.

LAWRENCE J. (*a*) This pauper can only have gained a settlement in *Boxley* by doing that which the statute of King *William* points out as equivalent to notice to the parish. The statute specifies a particular act to be done, and no equivalent
[173] for that act will satisfy it; but the words of the statute must be pursued, and no notoriety of employment in the parish will

(*a*) *Grose* J. was absent from indisposition.

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confer a settlement, unless it be by executing a public annual office or charge in the parish. This is clearly no *office*, but only an *employment* arising out of a contract: between which and an office there is a great distinction; as appears from 2 *Sid.* 142. and *Rex* v. *Milburne.* (*a*) Then it is said that this is a public *charge:* but I know not how we can distinguish that from a public *office* in this respect. It would be going a great way to say that every contract with the parishioners for any purpose concerning the parish was a *public charge;* for that would extend to contracts with carpenters and masons for keeping the church in repair, and the like, which can never be considered to be within the meaning of the act. But the word *charge* coupled as it is in the act with *office* must be taken to mean something of the same kind, though it may not commonly be known under the name of an office.

LE BLANC J. If this were to be deemed a public annual office or charge within the act, it would extend to every case where a person had a duty to perform which from its nature must be known to the parish in general. But there is a difference between an employment created by the parties themselves, which they may put an end to whenever they please, and that which exists or is created by law. Now this man was in the former situation. It was in the option of the overseers and parishioners to have such a person in such an employment or not; and they could put an end to the employment altogether whenever they pleased. It was created by themselves, and depended upon their contract. I cannot therefore call this an office or charge within the meaning of the act of parliament.

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Both Orders confirmed.

(*a*) 1 *Wils.* 87. and 2 *Stra.* 1225., where it was holden that a schoolmaster gained no settlement by executing his employment, which was no office.

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MOSELEY, Bart. *against* STONEHOUSE.

A certificate granted by a Judge at the assizes, upon the apprehension, and conviction of a burglar, exempting the prosecutor and his assignee from "all and all manner of *parish* and ward offices," exempts the party from serving the office of petty constable for a township within, but not co-extensive with the parish where the felony was committed, and for which the certificate was granted, to which office he was appointed at the court-leet of the manor co-extensive with such township.

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IN debt for 20*l.* the Plaintiff declared that he was seised in fee of the manor of *Manchester*, in the county of *Lancaster*, and that he, and all those whose estate he has, have from time immemorial had a court-leet or view of frankpledge of all the inhabitants and resiants within the manor, &c. and that from time immemorial there has been a custom there, that the inhabitants and resiants within the manor, charged and sworn to inquire and present those things which belong to the said court, &c. have yearly, at that court-leet, held within the manor, within a month next after *Michaelmas*, elected two fit persons of the inhabitants and resiants within the manor to be respectively constables of *Manchester*, &c. for the year then next following, who, if present, have been accustomed to be sworn in open court. The declaration then stated that at a court-leet holden within the manor, within one month, &c. viz. on the 1st of *October* 1804, the Defendant and one *J. R.*, who then and long before were inhabitants and resiants within the manor, being fit persons in that belief, were elected to be *constables of* Manchester aforesaid for the year ensuing, &c.: that the defendant, and *J. R.* were both present in court at the time of such election, and had notice thereof, &c.; but that the defendant, though requested. &c. refused to be * sworn into the said office of constable, &c. Whereupon the steward imposed a reasonable fine of 20*l.* upon him for the use of the lord; of which the defendant had notice, and was required to pay the same, but refused, &c. Pleas, 1st, Nil debet. 2dly, Actio non, &c. because long before the election of the defendant to be one of the constables of *Manchester*, viz. at the assizes, &c. and gaol delivery at *Lancaster*, on the 15th of *August* 1801, before Lord *Alvanley*, &c. one *E. B.* was convicted of burglary, &c. in the dwelling-house of *Samuel Hall*, *in the parish of* Manchester in the said county; and that Lord *Alvanley*, before whom the conviction was had, on the 24th of *August* 1801, at, &c. by his *certificate* under his hand, dated, &c. and which the defendant now brings here into court, did, pursuant to the statute in that case made, certify the said conviction in form aforesaid, and that the said *Samuel Hall*, and also *J. H.* and *W. W.* of the

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parish aforesaid, did apprehend and take the said *E. B.* and did prosecute her to conviction, &c.; and, pursuant to the stat. 10 & 11 *W.* 3. (c. 22.) the said Justice did further certify that by virtue thereof and of the said statute the said *S. Hall*, for the apprehension and conviction aforesaid, was thereby declared to be *discharged of and from all and all manner of* PARISH *offices within the* PARISH *of* Manchester *aforesaid*, as by the said certificate appears, which is duly inrolled of record at the general court of quarter sessions, &c. as in and by the said statute required. The plea then stated, that before such election, &c. the said *S. Hall* by indenture, &c. assigned the said certificate to the defendant for 35*l.* in pursuance of the power given to him by the statute; and averred, that before such assignment *S. Hall* had made no use of the certificate to exempt himself from any parish or ward office; and that the said *S. Hall* who made the assignment to [176] the defendant, and the *Sam. Hall* named in the certificate are the same. The plea then further stated, that the *parish of Manchester* in the certificate mentioned from time immemorial has been and is still divided into and contains divers distinct townships, one of which is the township of *Manchester*, and that the said *manor of* Manchester and the said *townships of* Manchester from time immemorial have been and still are *co-extensive* and *wholly within the said parish of* Manchester, and that the said election of the defendant to be a constable of *Manchester*, as in the declaration mentioned, was an election of him to be a constable of the *township* of *Manchester*, *being a parish office within the said township of* Manchester, *wherein the felony was committed* as aforesaid, to wit, at, &c. whereby and by force of the statute the defendant, at the time of such election, was and is exempt and discharged from the said office of constable, to which he was so elected as aforesaid, so being a *parish office within the said parish of* Manchester, to wit, at, &c.—Replication to the second plea, that the parish of *Manchester* in the certificate mentioned from time immemorial has been divided into and contains divers distinct townships, one of such being the township of *Manchester*, and that the manor of *M.* and the township of *M.* are co-extensive, and that the several and respective townships in the parish of *M.* during all the time aforesaid have been used and accustomed, and still of right ought to have several and respective constables for each township, wholly distinct and independent of each other, and that every person who has been elected to serve the office of constable within or for any of the said

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said respective townships have served and exercised the office of constable within and for that township only for * which such person was so elected constable; and that no person who, during all or any part of the time aforesaid, has been elected to serve the office of constable within or for any of the said respective townships, has served or exercised the office of constable within or for the said parish of *Manchester* at large, or any where within the said parish of *Manchester* out of the respective townships for which he was elected constable. That the election of the defendant to be a constable of *Manchester*, as in the declaration mentioned, was an election of him to be a constable of the *township* of *Manchester* aforesaid; and that the defendant, by virtue of that election, was confined to serve and exercise the said office of constable within the said *township* of *M.*, and ought not to, nor could by virtue of that election, serve or exercise the office within or for the said *parish* of *M.* at large, or any where within the said *parish* of *M. except within the township of M. aforesaid;* without this, that the said office of constable, to which the defendant was so elected, was a *parish office* within the said *parish* of *M.* &c. To this there was a general demurrer and joinder.

Wood, in support of the demurrer. The question is, Whether the certificate exempts the defendant from serving the office of constable in the *township* of *Manchester*, the whole of which is within the parish of *Manchester?* The statute giving the certificate is the 10 & 11 *W.* 3. *c.* 23. *s.* 2., which discharges the proprietor thereof "from all and all manner of *parish and ward offices within the parish or ward* wherein the felony shall be committed," &c. The only case on the books on the construction of the act is *Rex* v. *Derbyshire* (*a*) which differs from the present; for there the *manor* of *Birmingham*, for which the defendant was appointed constable, was more extensive than the *parish* of *Birmingham*, for which the certificate was granted; and therefore the certificate was holden not to exempt him from serving the office; and rightly so; for otherwise it would have had the effect of extending the privilege meant to be conferred by the statute to a district *without* the parish or ward wherein the felony was committed; which is contrary to the words of the act. But the court admitted that a constable whose jurisdiction did not extend *beyond* the parish might be

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(*a*) 2 *Burr.* 1182.

considered

considered as a *parish* officer within the act. [Lord *Ellenborough* having asked if he had found any case of an appointment of a constable for a *parish* eo nomine,] he answered that he was not aware of any. But he urged that if an appointment to a parish office for a district less than a parish, though within the boundary of it, were deemed not to be within the privilege of the statute, it would be rendered nugatory in the north of *England*, where most of the parishes are divided into townships which have separate overseers, and where there are no overseers for the *parishes* eo nomine. (It was observed contrà that *churchwardens* were appointed for the whole parish.) In some places there are only chapelwardens for the several townships; and in like manner the surveyors of the highways are appointed for the townships. The statute 10 & 11 *W.* certainly meant to use the words *parish officers* in their popular acceptation, including overseers of the poor, whether appointed for *townships* or *parishes*, *constables*, &c., though in strictness these latter may not be parish officers, as not deriving their title from any parochial appointment. (*a*) And in several other acts the [179] legislature appear to have classed *constables* with *parish* officers, as commonly so considered. As in stat. 13 & 14 *Car.* 2. c. 12. *s.* 15., which speaks of constables, &c. dying or going out of *the parish;* and *s.* 16., which speaks of the constable, &c. *of every parish.* So stat. 18 *Geo.* 3. *c.* 19., which speaks of constables, headboroughs, and tithing-men doing the business of *their parish*, township, or place, and delivering their accounts to the overseers of the poor of *the said parish*, &c.

Littledale contrà. The constable of a township, who has no jurisdiction in the rest of the parish out of the township, cannot be considered as a *parish* officer; which word *parish* is used in the statute as an adjective, qualifying the term *officer*, to which it is annexed, to mean an office co-extensive with the *parish:* as *county* magistrate, *county* rate, *county* treasurer, &c. are used in opposition to *city* or *borough* magistrate, &c. So sheriff, which is shire-reeve, port-reeve, &c. mean that the officer's jurisdiction is co-extensive with the place which is used as the adjunct to his office. The legislature having given a particular privilege,

(*a*) Upon the subject of the appointment of constables, vide 1 *Blac. Com.* 355. *Rex* v. *Stephens*, *T. Jones*, 212. *Comb.* 90. 1 *Roll. Abr.* 535. 1. The constable of *Stepney*'s case, 1 *Bulst.* 174.

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it cannot be extended beyond the words of the act; and the locality of the word *parish*, as there used, is further evinced by its being coupled with *ward*, which is a local district in a *city*, as *parish* is in a *county*. [Lord *Ellenborough*. Does not *ward* in a city correspond with hundred in a *county*; as in *London* the
[180] parishes are within the wards?] (*a*) If ward be a higher division than a parish, it would not shew that the latter meant to include a lower division as a township. The act meant to give an exemption co-extensive with the whole parish, for it applies to felonies committed within any part of the parish; and it would be contradictory to give it any other construction. The stat. 5 *Ann. c.* 31. *s.* 1. which is auxiliary to the statute of King *William*, gives 40*l.* reward on conviction of a housebreaker, and directs the Judge to certify in what *parish* the felony was committed. The case of parishes divided into townships is a *casus omissus* in this act, as it was in the general statute of the 43 *Eliz. c.* 2. which omission was afterwards supplied by the stat. 13 & 14 *Car.* 2. *c.* 12. [*Le Blanc* J. observed, that the overseers of the poor of townships in the North had always had the benefit of this statute of King *William*.] The principle laid down in *Rex* v. *Darbyshire* (*b*) was, that the officer claiming the exemption should at least claim it for an office co-extensive with the parish: and they considered that a constable was a civil officer, the nature of whose office had no relation to a *parish*, which is an ecclesiastical division. [*Le Blanc* J. Supposing the parish and manor co-extensive, would that vary the question?] In one sense it might, as the legislature looked to the locality of the exemption.

[181] *Wood* in reply. *A parish office within the parish* does not necessarily mean an office co-extensive with the parish, but may be taken to mean one which relates to the exercise of parochial duties within any part of the parish: and it would be a strange construction of the act to say, that if a township were co-ex-

(*a*) Ward is said to be so used in *Braddish* v. *Bishop*, *Cro. Eliz.* 260. and also in *Cro. Car.* 165. But in *Cro. Jac.* 222. it is said to be used for a parish. According to *Cowell's Interpreter*, *Ward* is a portion of a city under the charge or keeping of an officer; as the wards of the city of *London* under the charge of the respective aldermen. It is also used as a portion of a forest. *Wapentake* is the same as hundred.

(*b*) 2 *Burr.* 1132.

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tensive with the parish, which is sometimes the case, a certificate would exempt the owner from the offices of the township, but not otherwise. The legislature could never have contemplated so unmeaning a distinction. On the contrary, they meant to exempt the party from all offices to be exercised within the *parish* or *ward*. [*Grose* J. observed, that there were ward officers as well as parish officers.] *Ward* in the counties of *Cumberland* and *Northumberland* signifies the same as *hundred* in other counties.

Lord ELLENBOROUGH C. J. The question is, whether the office of constable for the manor and township of *Manchester*, which are co-extensive and within the parish of *Manchester*, which parish contains also other townships, is a *parish* or *ward office* within the meaning of the stat. 10 & 11 *W.* 3. *c.* 23. from serving which the defendant is exempt by means of the certificate obtained by him under that act? And that depends upon the construction of the words exempting the original proprietor or assignee of such a certificate "from *all* and *all manner* of *parish* and ward offices *within the parish* or ward" wherein the felony shall have been committed: whether those words shall receive a liberal and popular, or a strict and literal interpretation? If the words be construed strictly and literally, the office of petty constable must be excluded altogether; for constables are either appointed at the manor court or hundred court, either for the manor or vill, or for the hundred, and not for a *parish* eo nomine; and so of overseers of the poor in the north of *England*, who are for the most part appointed, not for parishes, but for townships; and yet ever since the passing of the act of King *William* the exemption of the certificate has always been considered as extending to these. If then we cannot satisfy the apparent intention of the act by a strict and literal construction of the words, we must adopt the more liberal and popular sense in which they appear to have been used. And the legislature, in other instances which were mentioned at the bar, have spoken of constables as of *parish officers*, in the popular sense of the word *parish*, meaning thereby officers whose functions were exercised *within* the parish; and unless we consider them to have used it in that sense in the stat. of King *William*, a very large portion of the realm must be deprived of the full benefit of it. The statute says that the party shall be discharged "from all *and all manner* of parish and ward offices," as if contemplating some-

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thing beyond what in legal strictness might be deemed to be a *parish* or *ward* office; but it does not specify any by name. If therefore we were to supply the mention of such offices only as in legal strictness fell under this description, we should only read "surveyors of highways of *parishes*, churchwardens, and overseers of the poor of *parishes;*" and considering ward as *hundred* it would only embrace *high* constables: all other constables would be excluded, and all officers of townships. But it is impossible that this could have been the meaning of the legislature. In a case therefore where inconvenience would result from a narrower and strict interpretation of the words, which would in a great measure defeat the apparent object of the legislature, we
[183] must adopt the more general and popular sense of them, which the legislature have themselves applied to parish offices on other occasions.

GROSE J. In construing the words of this statute we must consider what was the object of the legislature in making this provision. They meant to encourage and reward persons who exerted themselves for the public good in the apprehension and conviction of certain offenders, by exempting them from the burthen of serving what they describe as "all and all manner of parish and ward offices." It is proper therefore, in construing these words, to put the most beneficial sense upon them for the subject which they will admit of; and for this purpose we may fairly consider what has been the common language of the legislature in other acts in speaking of parish officers: and in the two which have been mentioned they have considered *constables* as *parish* officers. It appears then that they have sometimes used the appellation of *parish officers* in its common and popular sense; and therefore we may fairly consider, that in the present instance they meant to use it in that sense, and that they meant to exempt the owner of a certificate circumstanced as the defendant is from serving (amongst others) the office of constable, considering that as a parish office.

LAWRENCE J. I think that this act, which was meant to encourage the apprehension and conviction of certain offenders, was intended to have a general operation throughout every part of the kingdom, and ought not to be narrowed by a construction which would exclude a considerable part of the North from the benefit of it. Considering then the object of the legislature, and the general terms they have used, it cannot

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not be doubted that they meant to use them in their popular, and not in their strict sense. Constables are appointed either at the sheriff's tourn or at the court leet of the lord, and cannot therefore in strictness be deemed *parish* officers: but yet they are commonly so considered, and in the two acts which have been mentioned they are described as such: from whence we may infer, that the legislature in the present instance used the term "*parish* office" in the same popular sense. And not only the legislature in these acts of parliament, but writers of considerable eminence have considered constables as parish officers. Thus *Lambert* in his *Office of Constable*, p. 9. speaks of petty constables in towns and *parishes*, who were to aid the constables of the hundred. And *Blackstone* in his *Commentaries*, 1 vol. 356, says, "petty constables are inferior officers in every town and *parish*, subordinate to the high constable of the hundred:" these, he says, are all chosen at the court leet, or if no court leet be held, are appointed by two justices of the peace. Considering therefore that the legislature has used the description of *parish* officer in its popular, and not in its strict sense, there is no reason for confining it to officers who are properly appointed for the whole parish, and whose jurisdiction is co-extensive with it, but it may well be taken to comprehend officers of the same description appointed to exercise their offices in different parts of the parish, all of whom together may be considered in a general sense as the parish officers, though each may not exercise a jurisdiction over the whole parish. This differs from the case of *Rex* v. *Darbyshire*, to which the true answer was given at the bar. The object of the act of King *William* in giving the certificate was to exempt the possessor from the burthen of serving offices within the parish where the felony was committed, but not to extend the exemption to offices of more enlarged jurisdiction than the parish, which was the attempt made in that case, and therefore it cannot rule the present, which is an attempt to narrow the exemption to offices co-extensive with the whole parish.

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LE BLANC J. The question is, in what sense the legislature have used the term *parish offices* in this act of parliament, whether in its strict legal and technical sense, or in the more popular sense of it? And I know of no better rule for ascertaining in what sense words have been used in an act of parliament, than by seeing in what sense the same expressions have been used

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in other acts of parliament passed at no great distance of time from the act in question. Now in the act of *Car.* 2. it appears that a *constable* was considered by the legislature as a *parish* officer, and if the meaning of the act of King *William* were only doubtful, ought not such a construction to be put upon it as will extend its operation over the whole kingdom, rather than one which would deprive a great part of the kingdom of the benefit of it? It is not disputed that if the manor and parish were co-extensive, the certificate would exempt the party from serving the office of constable. But that is going a great way towards the adoption of a liberal construction of the act. And if that were admitted, as I think it must be, it will be doing no violence to the words to extend the exemption to a constable who is appointed to execute his office within the limits of the parish for which the certificate is granted. In the case of *The King* v. *Darbyshire* most of the arguments of the Judges went to shew that the certificate did not extend to offices to be exercised *beyond* the bounds of the parish, as that would be to extend the exemption into a different district than that in which the party had the required merit, which must be confined to the parish wherein the felony was committed. But this case is the converse of that; for the exemption is claimed to be exercised within a less extent than the legislature proposed as the reward of the public service performed by the party, but one which is comprehended within the proposed extent. I am therefore of opinion, that the certificate does exempt the defendant from serving the office of constable for the township of *Manchester*, the whole of which lies within the parish of *Manchester*, for which such certificate was granted.

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Judgment for the Defendant.

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ZOUCH, on the Demise of THOMAS FORSE, *against* HENRY FORSE. *Tuesday, Feb. 4th.*

IN ejectment for one moiety of a copyhold tenement in the manor of *Froom Vanchurch*, in the county of *Dorset*, which was tried before *Le Blanc* J. at the last *Dorchester* assizes, a verdict was found for the Plaintiff, subject to the opinion of the Court on the following case.

There can be no general occupancy of a copyhold, because the freehold is always in the lord; and the statutes 29 *Car.* 2. c. 3. *s.* 12. and 14 *Geo.* 2. c. 20. *s.* 9. appropriating estates pur autre vie where there is no special occupant do not extend to copyholds. And one who was admitted tenant upon a claim as administrator de bonis non to the grantee of a copyhold pur autre vie, having no title in such character, cannot recover in ejectment by virtue of such admission as upon a new and substantive grant of the lord.

At the court baron of the Duke of *Bolton* for his manor of *Froom Vanchurch*, in the county of *Dorset*, holden the 24th of *July* 1761, the lord of the manor, by his steward, granted to *Robert Forse* the reversion of a moiety of a copyhold tenement by copy of court-roll as follows: "At this court the lord of "the manor, by his steward, granted to *Robert Forse* of "*Porton*, &c. the reversion of a moiety of a customary tene- "ment and 46 acres of * land, &c. within this manor, now in "possession of *William Forse*, which he claims to hold for his "life by copy of court-roll of this manor, dated the 29th of "*April* 1725, remainder by another copy dated the 6th of "*May* 1740, to *Henry Forse*, son of the said *William Forse*, "for his life; to have and to hold the reversion of the said "premises, &c. *to the said* Robert Forse, *for the life of* Henry "Forse, his son, (aged ten years,) at the will of the lord, "according to the custom of the said manor, from and imme- "diately after the surrenders, forfeitures, or other determina- "tion of the estates of the said *William Forse*, and *Henry Forse* "his son, of and in the said premises: paying the yearly rent "of 15*s.* and an heriot, when it shall happen, and by and "under such other works, suits, &c. services, and customs as "are usually done and paid for the same. And for such estate "in reversion *the said* Robert Forse *(as sole purchaser) paid the* "*lord for a fine* 38*l.* But the admittance and fealty of the "said *Robert Forse* and *Henry Forse* his son, is respited until," *[187]
&c. *William Forse* continued seised till the year 1764, when he died; and upon his death the said *Henry Forse*, the son of *William Forse*, entered into and continued seised till 1793, when he died; and upon his death his widow entered and continued in possession till 1803, when she died. The abovenamed *Robert Forse*, to whom the reversion was so granted, died

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died intestate in 1775, leaving six sons, *William Forse* the eldest, *Henry Forse* the cestuy que vie named in the said grant, *Thomas Forse* the lessor of the plaintiff, and three others; and upon his death administration of his effects was duly granted to two persons who are since dead: after which, viz. *February* 1st, 1804, administration *de bonis non* was granted to the lessor of the plaintiff, who on the 25th of *August* 1804 was

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admitted tenant (*a*) to the said moiety for the life of the said *Henry Forse*, the son of *Robert Forse*. No evidence was produced of any custom in the manor that the cestuy que vies not taking by the habendum should have any beneficial interest. The question for the opinion of the Court was, whether the plaintiff were entitled to recover?

W. B. Taunton, for the lessor of the plaintiff, contended for his right to recover either under the *original grant* of the 24th of *July* 1761; and this either at common law, or by virtue of the statutes; or in equity; this being so plain a trust that the lessor of the plaintiff should not be defeated on his trustee's title: or under the *subsequent act of the lord* in the *admission* of the 24th of *August* 1804, operating as a new copyhold grant to the lessor of the plaintiff pur autre vie, and re-uniting the legal with the equitable estate. 1st, The lessor is entitled to recover at common law as quasi a special occupant impliedly designated by the terms of the original grant: because every grant is to be taken most strongly against the grantor, and so to be construed ut res magis valeat quam pereat; and a copyhold grant to one pur autre vie is equivalent to a grant to him *and his representatives* pur autre vie, and is not determined by the death

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of the grantee; for as he may assign it during the life of the cestuy que vie, and the lord would be bound to admit the assignee in fact, by the same reason he ought to admit the ad-

(*a*) The admission, upon which an argument was afterwards attempted to be raised, was in this form: "Manor of *Froom Vanchurch*, &c. At this court came *Thomas Forse* of, &c. and was admitted tenant to a moiety of a customary tenant and 46 acres of land, &c. *which he claims as administrator of* the goods, &c. of *Robert Forse*, late of *Porton*, &c. deceased, for the life of *Henry Forse*, by copy of court-roll of this manor, dated 24th of *July* 1761, it appearing by the said copy that the said *Robert Forse* was the sole purchaser thereof, and the said *Thomas Forse* did this day his fealty to the lady."

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ministrator of his grantee, who is an assignee in law, in order to give effect to the grant. [*Le Blanc* J. Is it not settled law, that there can be no occupancy of a copyhold?] *Co. Cop. s.* 56. says, that there may, though it is said in *Smartle* v. *Penhallow* (*a*) to have been adjudged otherwise. But it is laid down in many authorities (*b*) that a copyhold grant is to be construed according to the intent of the parties, and is not to be tied up to the strict rules of law. And here the intent of the lord plainly appears, that an estate for the whole life of *Henry Forse* should pass to the grantee. But if there were any doubt, the subsequent admission of the lessor of the plaintiff by the lord has explained his own grant, which it may well do, as the admittance in *Brookes* v. *Brookes* (*c*) explained the antecedent surrender; especially as the admittance in this case was made on a claim of right *as administrator* of *Robert Forse*. So in *Burgess* v. *Wheate* (*d*) Lord *Mansfield* said, that if the lord consent to a condition or trust on the court-roll, he is bound by it; for he cannot claim against his own act. And as a grant of a chattel interest in land to *A.* for the life of *B.* would enure in law as a grant to *A.* and his personal representatives, though not named, during the life of *B.*: so this which is a grant of a bare interest in land, under which the freehold does not pass to the grantee, must operate as a grant to the administrator of the grantee, in order to give effect to it; and the intention of the [190] lord that it should so operate is evinced by the subsequent admission of the administrator, as such. But supposing the grant would have determined at common law by the death of the grantee, the statutes 29 *Car.* 2. *c.* 3. *s.* 12. and 14 *Geo.* 2. *c.* 20. *s.* 9. will uphold the estate in his representative for the life of the cestuy que vie. The first statute enacts, that *any* estate pur autre vie shall be deviseable, and if not devised shall be chargeable in the hands of the heir, if it come to him as special occupant, as assets by descent; and if there be no special occupant, it shall go to the executors or administrators of the grantee, and be assets in their hands: and the latter statute directs, that where there is no devise of such estate, and no special

(*a*) *Smartle* v. *Penhallow*, 6 *Mod.* 65. 1 *Salk.* 188. and 2 *Ld. Ray.* 994

(*b*) *Co. Cop. s.* 35. (p. 97.) *Fisher* v. *Wigg*, 1 *P. Wms.* 15. *Rigden* v. *Vallier*, 2 *Ves.* 256, 9. *Brooks* v. *Brooks*, *Poph.* 125. *Cro. Jac.* 434.

(*c*) *Poph.* 125. (*d*) 1 *Blac. Rep.* 167.

occupant,

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occupant, the surplus of such estate, after payment of debts, shall be distributed as the personal estate of the owner. Then supposing there could be no general occupant of a copyhold, which never appears to have been expressly decided: (for it was not the principal point in *Smartle* v. *Penhallow*; (*a*) and *Coke's Copyholder*, *s.* 56. is otherwise,) that is no reason why there may not be a special occupant of it under the statutes; for at common law there could be no general occupancy of things lying in grant, as of a rent; (*b*) and yet the statutes extend to them. This is said in a note to 6 *Mod.* 66. to have been so adjudged in *C. B.*; and though a quære be there put, the point was expressly determined by Lord *Harcourt* in *Rawlinson* v. *The Duchess of Montague*, (*c*) who said, that if since the stat. of *Car.* 2. a rent be granted to *A.* for the life of *B.*, and *A.* die, living
[191] *B.*; *A's* executors or administrators shall have it during the life of *B.*; and the statute, he adds, in that case does not enlarge, but only preserves the estate of the grantee. And so is the opinion in *Kendal* v. *Micklfield*. (*d*) The same reason holds why copyhold should be preserved as well as other estates for life. There are several cases in equity where copyhold estates pur autre vie have gone to the personal representatives of the grantor. *How* v. *How*, (*e*) *Withers* v. *Withers*, (*f*) and *Rundle* v. *Rundle*. (*g*) [*Lawrence* J. Were not those cases of special occupancy? But have you any cases of common occupancy where it was holden that the representatives of the grantee should take against the lord? In *Withers* v. *Withers* Lord *Hardwicke* considered that the stat. 14 *Geo.* 2. *c.* 20. did not extend to copyholds.] He admitted, that he had not found any such case. But what was said in *Ambler* is but a loose dictum. At any rate, he contended, 3dly, that by the admission of the 24th of *August* 1804 the lord who had then the legal title, made a new and valid customary grant (*h*) of the copyhold to the lessor of the plaintiff, and thereby united the legal with the equitable title, which the lessor had in him before.

(*a*) 6 *Mod.* 65. 1 *Salk.* 188. and 2 *Ld. Ray.* 994.
(*b*) *Co. Lit.* 41. *Vaugh.* 190. 201. 2 *Rol. Abr.* 150. *Cro. Eliz.* 721. *Salk.* 189. 2 *Ld. Ray.* 1000.
(*c*) *Dec.* 1710. note to *Low* v. *Burron*, 3 *P. Wms.* 260.
(*d*) *Barnard Chan. Rep.* 49. (*e*) 1 *Vern.* 416. (*f*) *Ambl.* 152.
(*g*) 2 *Vern.* 264. (*h*) *Co. Cop. s.* 38.

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[Lord *Ellenborough*. If a stranger have no title, can admission give him a title? *Lawrence* J. and *Le Blanc* J. If the Lord admit one upon a mistaken claim, which turns out to have no foundation, how can that pass the estate to him? Lord *Ellenborough*. Have you any case where an admission upon an unfounded claim shall operate as a new and effectual grant from the lord?] At least it may operate so far as to pass to him the legal title which before was in the lord; and, according to 3 *Leon.* 210. which is recognized in *Gilbert's Tenures* 281. the [192] stranger shall be tenant at will, because he comes in by the assent of the lord. As in *Doe* d. *Martin* v. *Watts*, (*a*) an acceptance of rent, through ignorance of the party's title, will yet constitute a tenancy from year to year.

Lord ELLENBOROUGH C. J. That was in the case of a tenant in possession: but an admittance to a copyhold does not in itself constitute a possession: it only gives the party the means of possession if he have a good title to it. Nothing can be added further to the argument, and therefore we may relieve the plaintiff's counsel from further unnecessary trouble. The claim made by the lessor of the plaintiff was *as administrator de bonis non* of *Robert Forse* the grantee, upon which he was admitted; but in that character he could not be invested with any title, unless copyholds be within the statute of *Car.* 2. or of *Geo.* 2. But it having been decided that neither of those statutes extends to copyholds, it appears that he claims to be admitted in a character upon which no legal title could be founded, and in respect of which he ought not to have been admitted. Then unless this erroneous admission operate as a new grant, he can have no title at all. But it would be too much to say that that which was an admission upon a claim in a particular character, being vicious in that respect, shall operate as a new and express grant which neither the lord nor the tenant ever contemplated at the time.

LAWRENCE J. It never was determined that copyholds were within the statutes, and the contrary has been said in several cases; and there is good reason why they should not be con- [193] sidered to be within them; for if it were, it would take away the right of the lord. The object of the statutes was to provide for the occupation of estates pur autre vie which upon the

(*a*) 7 *Term Rep.* 85.

death

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death of the owners no person had a present right to occupy, and to apply them for the benefit of the creditors and representatives of the former owners. In *Doe* d. *Lempriere* v. *Martin* (*a*) Lord C. J. *De Grey* said, that there can be no general occupant of a copyhold, since the freehold is never out of the lord. And the statutes having been passed to obviate the inconvenience of general occupancy shews that they refer to estates pur autre vie of a different description from copyholds. Upon the other point the case is equally plain: if the terms of the admission be looked at, it cannot operate as a new grant; because the lessor of the plaintiff claims as administrator, &c. of *Robert Forse* in respect of the former grant to him, in consequence of which the lessor was admitted: but the lord by that did not admit him to any estate which the former grant did not convey.

LE BLANC J. The statutes only meant to extend to estates where no person would be injured by the appropriation; but if they extended to copyholds, they would operate to the prejudice of the lord, which was not intended. Then the lessor of the plaintiff can have no title but under a subsequent grant of the lord: but the admission of the lessor, claiming in a particular character under the former grant, cannot operate as a substantive grant of a new estate.

Postea to the Defendant.

Wollaston was to have argued for the Defendant.

(*a*) 2 *Blac. Rep.* 1150.

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Friday, *Feb.* 7th.

PERKS *against* SEVERN.

An affidavit to hold to bail, only stating that the defendant was "*indebted* to the plaintiff in 54*l.* *for goods sold and delivered*, (not stating *by the plaintiff to the defendant*) and as the acceptor of a bill of exchange." is insufficient.

THE Defendant was holden to bail upon an affidavit that he was "indebted to the Plaintiff in 54*l.* *for goods sold and delivered, and as the acceptor of a bill of exchange;*" and a rule nisi was obtained for discharging the defendant out of custody on filing common bail, upon the insufficiency of the affidavit, in not stating that the goods were sold and delivered *by the plaintiff*

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tiff to the defendant, and in not stating by whom the bill of exchange was drawn, or in what right the plaintiff sued upon it.

Wigley shewed cause and said that the defendant could not be *indebted to the plaintiff*, as it was sworn, in 54*l.* *for goods* sold and delivered, unless the goods had been sold and delivered by the plaintiff to the defendant; and that it was ruled last term in *Bradshaw* v. *Saddington* (*a*) not to be necessary to state in what character the plaintiff declared on a bill of exchange. There the affidavit was, that the defendant was indebted to the plaintiff in 100*l.* *upon and by virtue* of a certain bill of exchange drawn by the defendant, and long since due and unpaid.

Espinasse, in support of the rule, relied principally on the first objection, that the goods were not stated to have been sold and delivered *by the plaintiff to the defendant:* they might have been furnished upon the credit of a third person. And he referred to *Mackenzie* v. *Mackenzie*, (*b*) where *Buller* J. mentioned a case of an affidavit "that the defendant was indebted to the plaintiff in 5000*l.* *for money had and received*, and for which he had not accounted:" which was ruled to be insufficient. There it was not said, "money had and received *by the defendant to the use of the plaintiff*." And

The Court, on the authority of the last-mentioned case, held the present affidavit to be insufficient, and made the

Rule absolute.

(*a*) *Ante*, 94. (*b*) 1 *Term Rep.* 717.

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WELD *against* HORNBY, Clerk.

Monday, Feb. 10th.

Under ancient deeds recognizing a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brushwood, through which it is possible for the fish to escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape through the weir is debarred, though in flood times the fish may still overleap it.

The enhancing, straitening, or enlarging of an ancient weir, as well as the new erection of one, for the purpose of stopping fish in their passage up a river, is treated as a public nusance by Magna Charta, c. 23. and 12 *Ed.* 4. c. 7. and the right to convert a brushwood into a stone weir is not evidenced by shewing that 40 years ago two-thirds of it had been so converted, without interruption: and the action for the injury having been brought within 20 years after the remaining third part was so converted.

THE Plaintiff declared, upon his possession of a sole and several fishery, and also of a free fishery, and common of fishery in the several parts of the river *Ribble*, which lay in the respective manors of *Ribchester*, *Dutton*, *Aighton*, *Bailey*, and *Chaigley*; and also in that part of the river *Hodder* which lies in the last-mentioned manor, and which discharges itself into the *Ribble*; and then alleged that the Defendants wrongfully continued a weir or dam across the river *Ribble*, lower down the stream than the plaintiff's fisheries, per quod, salmon and other fish were prevented from coming to the plaintiff's fisheries, and from spawning there, &c.; and the plaintiff could not enjoy his fisheries in tam amplo modo. One of the counts described the obstruction to be by continuing a weir or dam made *larger, closer, firmer, and higher than it* * *ought to have been*, per quod, &c.; and another more generally. Plea not guilty. At the trial before *Sutton* B. at *Lancaster*, it appeared that the plaintiff, who had been in possession of his estate about 29 years, was intitled to a right of fishery in the river *Ribble* above the defendant's weir, and that before the obstruction complained of he had taken plenty of salmon and other fish within the limits of his fishery, but after the alteration in the defendant's weir there were but few fish to be taken at any time, and sometimes none. That till about forty years ago, the defendant and the prior owners of *Brockhole's* mill had always had a brushwood weir across the river *Ribble* near the mill; and he shewed by old deeds, for two centuries back, that they had a right to have a weir across the river for the use and convenience of their fishery, which right was expressed in those deeds in large and general terms, not limitted as to the heighth, or restricted as to the materials of the weir; but none of the witnesses could remember any other than a brushwood weir prior to the year 1766. At that period

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the then owner of *Brockhole's* mill erected a solid stone weir two-thirds across the river in lieu of the former brushwood, leaving the other third composed of the same materials as before; to which it did not appear that any objection was made; and in 1784 the remaining third of brushwood was removed, and the stone weir carried quite across the river. This weir was a solid piece of masonry, (having three locks in it, as the former wooden weir had for the purpose of catching fish,) about ten feet broad, and nearly level at top, with a straight perpendicular side towards the fall of the river. There was a contrariety of evidence as to the relative heighth of the new to the old weir, but in the result it did not appear that the present stone weir was either broader or higher than the former brushwood [197] weir, making reasonable allowance for the sinking of the latter after a time. The present action was brought within three months before the expiration of 20 years from the last alteration. The learned Judge directed the jury to consider, first, whether the alteration of the weir made in 1784 were injurious to the plaintiff's fishery in the stream above: and if it were, then secondly, whether such alteration were made by the defendant in the exercise of his own right, as evidenced by the several deeds, shewing that the defendant and those under whom he claimed had a right to erect and preserve a weir at *Brockhole's;* or whether there were any encroachment on the plaintiff's right by the alteration made 40 years ago, when a stone weir was erected two-thirds across the river, which had been acquiesced in without complaint, and by the completion of the weir with stone nearly 20 years before this action brought. And he told the jury, that if there had been an uninterrupted enjoyment of the weir in its present state for 20 years, this action could not be maintained: but that though less than 20 years did not of itself afford a conclusive presumption of right; yet that such a length of possession as had been shewn by the defendant, and of acquiescence on the part of the plaintiff, was certainly evidence of title, and connected with the other circumstances was evidence for them to say whether or not such a possession had a legal commencement, or were an encroachment on the plaintiff's right. The jury on this returned a verdict for the defendant, stating at the same time that they thought the alteration of the weir in 1784 was prejudicial to the plaintiff's fishery, but that the defendant's right

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was by length of possession and other evidence of title well established.

* In *Michaelmas* term last it was moved to set aside the verdict, as contrary to the evidence of the actual injury sustained
* [198] by the plaintiff from the alteration of the weir in 1784, and not warranted by any legal inference to be drawn in favour of the defendant's right from the ancient deeds, explained as they were by the description of the weir which had been always in use before 1766, or from the partial encroachment which had been then made, but which still left such a passage for the fish over the remaining brushwood weir as made it not material for the plaintiff to assert his right. A rule nisi was accordingly granted.

Topping, *Scarlet*, and *Holroyd* now shewed cause, and argued shortly upon the weight of evidence in favour of the defendant's right to have a weir of stone if he pleased from the alteration made in 1766 so long acquiesced in, and followed up by the completion of the work in 1784. And they also adverted to the contrariety of evidence as to the injury to the plaintiff from the latter alteration.

Cockell, Serjt., *Park*, *Wood*, and *Raine* were to have supported the rule.

Lord ELLENBOROUGH C. J. It is impossible to sustain this verdict. The right set up by the defendant to have a stone weir is plainly founded upon encroachment. The erection of weirs across rivers was reprobated in the earliest periods of our law. They were considered as public nusances. The words of Magna Charta (*a*) are, that "all weirs from henceforth shall be utterly pulled down by *Thames* and *Medway, and through all*
[199] England," &c. And this was followed up by subsequent acts, (*b*) treating them as public nusances, forbidding the erection of new ones, and the enhancing, straitening, or enlarging of those which had aforetime existed. I remember that the stells erected in the river *Eden* by the late Lord *Lonsdale* and the corporation of *Carlisle*, whereby all the fish were stopped in their passage up the river, were pronounced in this Court, upon a motion for a new trial, to be illegal and a public nusance. Now here it appears that previous to the erection of this complete stone weir there had always been an escape for

(*a*) *Ch.* 23. (*b*) Vide 12 *Ed.* 4, c. 7.

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the fish through and over the old brushwood weir, in which those in the stream above had a right; and it was not competent for the defendant to debar them of it by making an impervious wall of stone through which the fish could not insinuate themselves, as it is well known they will through a brushwood weir, and over which it is in evidence that the fish could not pass, except in extraordinary times of flood. And however 20 years acquiescence may bind parties whose private rights only are affected; yet the public have an interest in the suppression of public nusances, though of longer standing. No objection however of this sort can apply to the present case, where the action was commenced within 20 years after the complete extension of the stone weir across the river, by which it is proved that the plaintiff has been injured. Then, however general the words of the ancient deeds may be, they are to be construed, as Lord *Coke* says, by evidence of the manner in which the thing has been always possessed and used.

LAWRENCE J. The jury themselves have found the fact, that the plaintiff's fishery is injured by the stone weir, and [200] therefore the verdict is against the evidence: and there is no bar to the action from any length of possession in the defendant.

Per Curiam. Rule absolute.

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Thursday, Feb. 6th.

STAMMERS *against* DIXON.

One may hold the prima tonsurâ of land as copyhold, and another may have the soil and every other beneficial enjoyment of it as freehold.

And ancient admissions of the copyholder and those under whom he claims the land, by the description of "tres acras *prati*," may be construed only to carry the *prima tonsurâ*, if in fact they have enjoyed no more under such admissions, while another has had the aftercrop, and has cut the trees and fences, scoured the ditches, repaired the fences, and kept the drains; though the copyholder may have paid all the rates and taxes, which was in his own wrong,

TRESPASS for breaking and entering the Plaintiff's close called *Bird's Mead*, in *Langford*, in the county of *Essex*, and removing the earth there, &c. The declaration contained four counts, the two first for trespasses committed on the 16th of *May* 1803, and on divers other days before the exhibiting of the plaintiff's bill, and the two last for trespasses committed on the 31st *December* 1804, and on divers other days, &c. and carrying away a wooden tunnel from the close. Plea 1st, not guilty; 2dly, as to the first and second counts, that the close in which, &c. was called and known as well by the name of *Monk's Hope* as of *Bird's Mead*, and was a copyhold tenement of the manor of *Hatfield Peverell* in *Essex*; and that before the trespasses complained of, viz. on the 28th of *September* 1782, the lord granted the said copyhold to one *S. Sandford*, habendum to him his heirs and assigns, at the will of the lord according to the custom of the said manor, by virtue whereof *S. S.* entered and was seised in fee, according to the custom of the manor; and then the Defendant, as his servant, and by his command, justified the breaking and entering, &c. And as to the trespasses in the third and last counts, the defendant justified in like manner under *S. S.* as a customary tenant of the said manor under a grant from the lord of a customary tenement on the 12th of *April* 1804, to *S. S.* his heirs, &c. The replication joined issue on the plea of not guilty, and *denied that the *close* in which, &c. was a copyhold tenement, as alleged in the second plea, or a customary tenement, as alleged in the third plea, of the manor of *Hatfield Peverell*; on which issues were also joined.

The action was brought at the last assizes for *Essex* before *Heath* J. in order to try the plaintiff's right to the soil of the close in question; the plaintiff claiming it as his freehold, the defendant insisting that it was his copyhold or customary estate holden of the manor of *Hatfield Peverell*. It appeared that the close was known as well by the name of *Bird's Mead* as of *Monk's Hope*; that it was low meadow land, consisting of three acres, bounded on one side by the river *Blackwater*, on another side by a small ditch or grip, beyond which was a piece of land,

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half an acre, in the occupation of the plaintiff, rented by him of a Mr. *Westcomb*, and called *Westcomb's Half-acre*. The plaintiff had scoured the river, and laid part of its mud on the banks for the purpose of raising them; the throwing back of which into the river by the defendant was one of the trespasses complained of. And the defendant had also removed from the grip or ditch an old trunk which had a valve that prevented the river from flowing into the close in times of flood, and at other times carried off the water from the close, which was the other act of trespass complained of. It appeared in evidence, that the plaintiff and all former occupiers of the close under Mr. *Westcomb*, and those whose estates he has, for more than 60 years past had exercised divers acts of ownership upon the said three acres after the fore-crop had been taken by the defendant and those under whom he claims. Mr. *Westcomb*'s tenants had always turned their cattle on the three acres, and had the exclusive feeding of them from *Old Lammas* till *Old May-day*. They had cut the bushes for repairing the fences of the close; [202] and at subsequent periods erected and maintained at their expence posts and rails on part of the premises: they had put down the wooden tunnel in the ditch; and had from time to time lopped two ashes and a willow growing on the premises; and frequently scoured the ditch or grip before-mentioned. One of the tenants about 13 years ago had scoured the river, and laid the mud on the banks; and another former tenant or owner of *Westcomb's* estate had cut the bushes on the three acres, and carried them to repair the fences of the adjacent field in his occupation. On the other hand, the defendant (who had purchased from *S. Sandford* on the 12th of *April* 1804) proved that *S. Sandford*, and all those whose estate he had, had always taken the fore-crop of grass and pasturage from *Old May* to *Old Lammas* day. That the *Sandfords*, (who lived four miles off, and had no other lands nearer,) had scoured the ditch or grip twice. That they had paid all the parish rates, the land-tax, and the composition for the highways, in respect of the three acres. And he also produced the court-rolls of the manor of *Hatfield Peverell*, which are extant only from the reign of Queen *Mary*, in which appeared an entry of a surrender in the 18th of *Eliz.* by *John Bird* and *Margery* his wife of a copyhold tenement, by the description of "*Tres acres prati, vocati* Monk's

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Hope, *jacentes in* Langford," to the use of the surrenderors and the survivor for life, remainder to the heirs of the wife; with an admission according to the surrender: and there were seven other similar Latin entries of admissions, surrenders, descents, and devises (including a recovery;) and also regular entries in English from the year 1747, when a *Sandford* was first admitted, down to the 12th of *April* 1804, when *S. Sandford*, who was
[203] before admitted in fee, surrendered to the defendant; in all which English entries the premises are described as "*three acres of meadow lying in* Langford, *called* Monk's Hope." The learned Judge being desirous of referring the question of law to this Court, and for that purpose of settling the facts as to those acts of ownership which had been exercised by the plaintiff and defendant respectively, left it to the jury to say in whose favour the weight of evidence preponderated, exclusive of the entries of admissions in the court-rolls, the construction and effect of which he was desirous to reserve for the consideration of this Court: and under that advice the jury first found that the weight of evidence in respect of those acts of ownership was in favour of the plaintiff. Whereupon the learned Judge directed them to find a general verdict for the plaintiff; he being of opinion that though the terms of the surrenders and admissions were sufficiently comprehensive to pass the soil and freehold; yet that, as in ancient grants, the legal import might be restrained by long concomitant usage, which might be taken as evidence of the original intent of the Parties in making the grant; so here by received usage the grant might be restrained to and only pass the *fore-crop*, which would not carry the *soil;* but he permitted the defendant's counsel to move to set aside the verdict for the plaintiff, and enter a verdict for the defendant, if this court should be of opinion with the latter upon the construction and effect of the written evidence. And a rule nisi having been obtained in last *Michaelmas* term,

Shepherd and *Bayley*, Serjts. now shewed cause. The defendant does not confine his claim to the fore-crop; but the principal issue is, Whether the locus in quo be *copyhold* of the manor of *Hatfield Peverell*, that is, Whether the *whole* interest in the land, including the *soil*, and not merely the *prima tonsurà*, be the copyhold of the defendant: for if the *soil* be the *freehold* of the plaintiff the verdict has been rightly found, though the *prima tonsurà*

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tonsurà be the *copyhold* of the defendant. No doubt, as Lord *Coke* (*a*) shews, there may be a copyhold interest in part and a freehold interest in other part of the same land. And though the fact of having always taken the fore-crop may be evidence of a right to the soil, it is only *evidence;* and that conclusion may be rebutted by other evidence of acts of ownership done by another. Suppose all the interest in the land had been freehold, and one had always taken the fore-crop, and another the after-crop, the freehold of the soil might be in either, and in which of them it was must be decided by shewing which of them had exercised every other act of ownership, such as cutting trees, and fences, putting up and repairing fences, scouring ditches and applying the soil, keeping drains, &c. all which have been done by the plaintiff in this case, who has always enjoyed the land for the rest of the year after the fore-crop was taken. Then whether the right claimed by the defendant arise to him as a freeholder or as a copyholder, the evidence must be the same against one claiming an adverse right. And though old title deeds be evidence, yet they are entitled to little or no weight, unless accompanied with the possession. And though the terms of the copyhold-grant to the defendant be sufficient as between him and the lord to pass the soil, yet they cannot conclude the plaintiff who is a stranger to both, and who has had so long a possession against both. It might have been different if both parties had claimed by copy under the lord, and the plaintiff's copy had been less extensive and general than [205] the defendant's; for then perhaps the acts of the same lord might have been strong evidence as between his tenants. But here the question is in effect between the lord of the manor claiming the freehold of the soil in question against the plaintiff, who claims it as his freehold. Then it is not enough for the lord to shew that he has demised the land by copy for a long period of time, unless he also shews that his tenant has had possession under it. And it is competent to the plaintiff to shew that during all that time he has exercised every act of ownership upon the estate except taking the fore-crop. Such adverse possession therefore is sufficient to explain and control the terms of the lord's grant, and to shew that it only passed the fore-crop, which alone has ever been enjoyed under it. It is however

(*a*) Vide *Co. Cop.* s. 42. *Hoe* v. *Taylor*, 1 *Rep.* 36. and *Co. Lit.* 58. *b.*

immaterial

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immaterial in this case, whether the soil ever were part of the manor of *Hatfield Peverell;* for consistently with the evidence in the cause it might have been parcel of the demesnes of the manor, and the lord may have granted the fore-crop by copy to those from whom the defendant claims, which would give the tenant a right to maintain trespass against those who trespassed upon his fore-crop; and the lord might have granted the fee, excepting the fore-crop, to those from whom the plaintiff claims. The jury then have found the facts according to the evidence, and upon those facts the conclusion of the learned judge at the trial was warranted by law.

Garrow and *Marryat* in support of the rule. Admitting that the right to the fore-crop is not conclusive of the right to the soil, yet prima facie the enjoyment of the fore-crop imports the possession of the freehold; and such is the presumption of
[206] law in the absence of other more certain evidence of the original grant, according to the opinion in *Ward* v. *Petifer.* (*a*) [*Lawrence* J. observed that Lord *Kenyon*, in a case of *Newstead* v. *Keys*, *E.* 34 *Geo.* 3. had said that the opinion there delivered was not quite accurate, for that all which was there determined was that *prima tonsurà* was *evidence* only of the right to the soil. To which *Marryat* answered that he was counsel in that case, and that the verdict was in favour of the party who had enjoyed the *prima tonsurà*.] And in a case where the claims of both parties must originate from grant every presumption is to be made in favour of him who shews a grant comprehending the soil in the terms of it, and against the party who does not produce any title deeds, which he may purposely withhold because they may only convey the after-crop. Neither were the other acts of ownership (exclusive of taking the fore-crop by the defendant) all in favour of the plaintiff; for the defendant had scoured the ditch twice. And as to the setting up and repair of the fences, to which purpose also the cuttings of the trees and bushes were applied, it is rather a burthen than a benefit, and was much overbalanced by the payment of all the rates and taxes for the whole land by the defendant. At any rate however the effect of the entries in the court-rolls ought not to have been withdrawn from the consideration of the jury; for at least they were important to shew in what right

(*a*) *Cro. Car.* 362.

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the defendant claimed to take the fore-crop, and those entries went to shew that he claimed in right of the ownership of the soil.

Lord ELLENBOROUGH C. J. Upon the first discussion of this question, though I thought the verdict was right, yet I doubted how far the learned judge's direction could be sustained; but I am now satisfied that they were both right. This is an action for certain trespasses alleged to have been committed in the plaintiff's close called *Bird's Mead*, which close, known otherwise by the name of *Monk's Hope*, the defendant by his plea alleges to be copyhold holden under the manor of *Hatfield Peverell*, and justifies the trespasses in that close under a grant from the lord, and by the command of the copyholder. Now the word *close* imports in the abstract the interest in the soil; and if the defendant only make out that he has a partial interest in the land, such as the right *primæ tonsuræ*, the issue must be found against him. And the evidence shews that from all time the defendant's benefit has been confined to the taking the fore-crop, and that every other benefit of the land has been enjoyed by those from whom the plaintiff claims. We must then construe the rights of the parties, however derived from ancient grants, consistently with the possession: and there will then exist a copyhold interest in the prima tonsura for the defendant, and every other freehold interest in the land for the plaintiff. But this it is said, is inconsistent with the entries on the court-rolls, which grant an interest in the soil to the tenant, and were evidence for the jury to shew in what right the defendant claimed and took the fore-crops. The admissions are to "tres acras *prati*;" but can it be said that the word *prati* is not open to receive any construction which will carry a less interest than the whole right to the soil. The Judge thought that if the usage in fact were that the defendant and those under whom he claimed had never enjoyed any other benefit of the land than the fore-crop, and that those under whom the plaintiff claimed had enjoyed every other benefit of it, that word might receive a construction conformable to the actual enjoyment: and I think he was right in that opinion. And then he properly put the question to the jury to say how the fact of the enjoyment was: and when they found that the possession of every thing but the prima tonsura had been with the plaintiff; he gave it as his opinion that the word prati would admit of such a construction as to pass only the

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the fore-crop to the defendant; and that therefore notwithstanding those admissions the jury might find for the plaintiff; reserving for the judgment of this court the simple question of law upon the legality of such construction. With that direction, so understood, I do not find fault, thinking it substantially right.

LAWRENCE J. I am of the same opinion. The learned Judge told the jury, that they need not consider the effect of the admissions, because the construction of them was with him. He could not have meant to say, that the admissions were not to be considered at all: but he desired them first to consider the weight of the evidence of acts of ownership; and when they had found that in favour of the plaintiff, he considered that the word *prati* with reference to the usage might be confined to the prima tonsura of the land. That in substance was the direction on which the verdict was founded. And on the merits I see no ground for setting it aside. The taking of the fore-crop is only evidence of the right to the soil, and all the rest of the evidence was with the plaintiff. And at all events nothing can be inferred from the charge upon the defendant for all the taxes of the land; which was certainly wrong, as they ought to have been apportioned according to the value of the enjoyment by the respective parties.

[209] LE BLANC J. The only question is, whether we should send this case to a new trial in order to have in substance the same direction given to another jury. For on the next trial the Judge would tell the jury, that as the admissions might either be construed to pass the whole soil, or only the first crop, they ought to take into their consideration the weight of evidence of all other acts of ownership and enjoyment by the plaintiff and those under whom he claimed, as shewing his right to every other interest in the land except the first crop; and that the terms of the admissions were not incompatible with such a right in the plaintiff. In that view of the case the same thing has in effect been done. There were certain written entries given in evidence on the part of the defendant, upon the construction of which the jury were properly to take the advice of the judge: and the Judge told them, that according as they found the weight of the evidence of acts of ownership with the defendant or the plaintiff, he was of opinion that those admissions would carry the whole soil, or only the first crop to the defendant. There

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was nothing therefore withdrawn from the consideration of the jury, which they ought properly to have considered apart from the advice of the Judge.

Rule discharged.

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SWAN and Others *against* STEELE, Clerk, and WOOD.

Friday, Feb. 7th.

IN assumpsit, the Plaintiffs declared, first, on a bill of exchange, dated 26th of *August* 1803, drawn by *D. Maitland* on *Campbell* and Co. for 342*l.*, payable to the order of the Defendants and one *Geo. Payne*, deceased, three months after date, and indorsed by the defendants and *Payne*, under the firm of *Wood* and *Payne*, to the plaintiffs; and which bill *Campbell* and Co. had accepted. The plaintiffs; also declared for goods sold and delivered, and on the common money counts. The defendant *Steele* pleaded non assumpsit, and the defendant *Wood* suffered judgment by default. And at the sittings after last *Trinity* term at *Guildhall* the jury found a verdict for the plaintiffs for 368*l.* 5*s.* 4*d.*, subject to the opinion of the court on the following case.

Wood and *Payne* mentioned in the pleadings were wholesale grocers in *Liverpool*, trading under the firm of *Wood* and *Payne* from *Jan.* 1802 until *Jan.* 1804; with whom the defendant *Steele* became a partner in *May* 1802, and so continued till *January* 1804, in the business of buying and selling cotton; which business was also carried on under the same firm of *Wood* and *Payne*, and at their counting-house; but *Steele* was never interested in the grocery business. *Steele* took no active part in the cotton concern; nor was it known to the world or to the plaintiffs that he was a partner. The plaintiffs sold to *Wood* and

A., *B.*, and *C.* traded under the firm of *A.* & *B.* in the cotton business, *C.* not being known to the world as a partner; and *A.* and *B.* traded as partners alone under the same firm in the business of grocers; in which latter business they became indebted to *D.*, and gave him their acceptance, which not being able to take up when due, they, in order to provide for it, indorsed in the common firm of *A.*

and *B.* a bill of exchange to *D.*, which they have received in the cotton business in which *C.* was interested; but such indorsement was unknown to *C.*, of whom *D.* the indorsee had no knowledge at the time; held that such indorsement in the firm common to both partnerships of a bill received by *A.* and *B.* in the cotton business bound *C.* their secret partner in that business, and that consequently *C.* was liable to be sued by *D.* on such indorsement, the latter not knowing of the misapplication of the partnership fund at the time.

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Payne as grocers, a quantity of sugar, for which they gave their acceptance in the firm of *Wood* and *Payne*, * at four months, due the 11th of *October* 1803; and not being able to provide for it when due, *Wood* and *Payne*, on the 8th of *October* 1803, delivered to the plaintiffs the bill mentioned in the declaration due the 29th of *November*, with others, to provide for that acceptance; and the said bill was indorsed by either *Wood* or *Payne* in the firm of *Wood* and *Payne*, without the actual knowledge of *Steele*, as all other bills in the cotton concern were. The said bill had been paid to *Wood* and *Payne as cotton dealers* by the drawer thereof for cotton sold to him, in which *Steele* was as aforesaid interested: and the name "*D. Maitland*" thereto subscribed as the drawer, was the hand-writing of *D. Maitland* of *Wigan*, to whom the cotton was sold. The said bill has been dishonoured, of which *Wood* and *Payne* had due notice. *Wood* and *Payne* became bankrupts on the 16th of *January* 1804, and the effects of the said cotton concern are insufficient to discharge its debts; and *Steele* when he was discharged those debts will be a creditor of the concern. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover? If they were, then the verdict was to stand; otherwise, a verdict was to be entered for the defendant *Steele*.

Wood for the plaintiffs. *Wood* and *Payne* being partners with *Steele*, had authority to dispose of the partnership effects for such purposes as they thought proper. One partner may negotiate or indorse bills without the other; so he may sell the partnership effects, or release partnership debts. And he is only liable to his partners for misapplication of the funds: but it is a good disposition as to third persons, unless they collude with one to defraud another partner: and no fraud is imputed here. The court then desired to hear the other side.

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Littledale, contrà, said, that the bill in question was not taken originally as payment for the goods in the usual course of trade, but was afterwards received by the plaintiffs as collateral security for the payment of *Wood* and *Payne*'s own acceptance. It was therefore given by the two partners as a *pledge*, and not as payment; and one partner has no authority to *pledge* the goods or securities of another. The only difference between this case and that of *Sheriff* v. *Wilkes* (*a*) is, that there

(*a*) 1 *East's Rep.* 48.

the

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the creditor, when he accepted the security from one of the partners for his particular debt, knew that it was part of the partnership funds. [Lord *Ellenborough*. That makes all the difference.] But whether the creditor acquire that knowledge before or after the acceptance of the bill cannot make any difference in this case, where he seeks to bind the defendant *Steele* by an implication of law in consequence of the fraudulent act of his partners; not having looked to his security at the time. For no contract can arise by operation of law out of a fraud against an innocent person, because of the ignorance of one of the parties to the contract at the time of the interest of such innocent person. If the plaintiff's knowledge of *Steele's* interest in the bill at the time of its indorsement to him would have avoided the indorsement as fraudulent, it is incongruous to say that his coming to the same knowledge subsequently shall give him a new security which he did not before contemplate. [*Le Blanc* J. Suppose the bill had been made payable to *Wood*, *Payne*, and *Steele* by name, and *Wood* had indorsed it in the partnership firm, without the knowledge of *Steele*, would not that have bound them all, unless the creditor had known that this was done without the knowledge or consent, and in fraud of *Steele?*] If the creditor received it in payment for the individual debt only of the one partner, he ought perhaps to apply to the other to know if the indorsement were made with his consent, without which he must necessarily know that it was a fraud upon such other partner.

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Lord ELLENBOROUGH C. J. It would be strange and novel doctrine to hold it necessary for a person receiving a bill of exchange indorsed by one of several partners to apply to each of the other partners to know whether he assented to such indorsement; or otherwise that it should be void. There is no doubt that in the absence of all fraud on the part of the indorsee, such indorsement would bind all the partners. There may be partnerships where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts of any of the partners in the name or firm of the partnership. The case is too clear for argument, and I should not have permitted the point to be reserved if I had not understood at the trial that there were some other facts in the case which might raise a doubt. The distinction is well settled, that if a creditor of one of the partners collude with him to take payment or security for his individual debt out of the

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the partnership funds, knowing at the time that it is without the consent of the other partners, it is fraudulent and void; but if it be taken bona fide without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the

[214] partner in giving such security can disaffirm the act. Now here the three persons were trading under the firm of *Wood* and *Payne*, and in the course of their dealings as partners received the bill in question; and when competent to either of them by his indorsement in the name of the firm to pass their interest in the bill: and the plaintiffs, ignorant of any fraud at the time, take it by such indorsement from one of the partners. Then if the interest of the plaintiffs in the bill were once well vested, no subsequent knowledge that such indorsement was made without the consent of one of the partners will devest it. And it would be highly inconvenient that it should; because if the plaintiffs had been apprised at the time that the partner who indorsed the bill had no authority to do so, they might have obtained some other security for their demand.

The other Judges all concurred.

Postea to the Plaintiffs.

Saturday, Feb. 8th.

The KING *against* WATSON.

Whether or not a parish can have the benefit of the stat. 43 *Eliz.* c. 2. by maintaining its poor with not more than four overseers, is a fact which the Sessions ought to find, and should not leave to be presumed by the Court

THIS came on upon a rule to shew cause why an order of Sessions, disallowing the appeal of the Defendant against a rate for the relief of the poor of the township of *Bedlington*, in the parish of *Bedlington*, in the county of *Durham*, should not be quashed for the insufficiency of it. The appellant, who was an occupier of lands in the said township, appealed to the Sessions against the rate, on the ground that the township of *Bedlington* was not in point* of law entitled to maintain its own poor by a separate rate made upon it, apart from the rest of the parish of *Bedlington*; but that the township of *Bedlington*, together with the townships of *Netherton*, *Choppington*, *East Sleekburn*, *West Sleekburn*, and *Camboise*, (all of which townships are

from other conflicting evidence stated in a case reserved; such as, that the parish had the benefit of the statute down to 1730, and from thence to 1753 it was uncertain how the poor were maintained there, and that from the latter period the poor had been maintained separately in six townships; but that the population was decreased.

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situate within, and together constitute, the parish of *Bedlington*,) ought to maintain their poor conjointly by one general rate for the whole parish. But the sessions disallowed the appeal, subject to the opinion of this court on the following case.

Previously and up to the year 1739 the six several townships in the parish of *Bedlington* were united, and the poor of the parish were maintained by one joint and general rate, made by the four churchwardens and two overseers appointed for the whole parish, upon the occupiers of rateable property within the same. From 1739 to 1753 it does not appear by what rate the poor of the parish were maintained, or how the overseers of the poor were appointed during that period: but since 1753 to the present time the parish has been divided into six townships, and the poor of each township have been maintained by a separate rate made upon each respective township, and separate overseers of the poor have been appointed for each township. The parish of *Bedlington* has rather decreased in population; but the decrease has been principally in the township of *Bedlington*. Two orders for the removal of paupers have been made, one from the township of *Bedlington* to the township of *Netherton*, dated the 17th of *July* 1798, and the other from the township of *Netherton* to the township of *Bedlington*, dated 13th of *November* 1798, which orders of removal were acquiesced in. The rental of the rateable property in the township of *Bedlington* appears by the present rate to be 3905*l.* 2*s.* The parish of [216] *Bedlington* is five miles in length and three miles in breadth. Constables have been appointed in each of the six townships.

When this case was called on, *Const* and *Littledale* appeared as counsel in support of the order of Sessions, and *Topping*, *Wood*, and *Hullock* contrà. And Lord *Ellenborough* having asked why the Sessions did not find the fact, whether or not the parish of *Bedlington* could have the benefit of the stat. 43 *Eliz.* *c.* 2., which he said was a fact for them to decide, and not to be left to the Court to presume from other evidence; (*a*) *Const* referred to *Peart* v. *Westgarth*, (*b*) *Rex* v. *Sir W. Horton*, (*c*) *Rex* v. *Leigh*, (*d*) and that class of cases, where the Court had decided the same sort of question upon general evidence of the circumstances and usages of the parish, shewing that it could

(*a*) Vide *Rex* v. *Nowell*, 4 *Term Rep.* 266, and *Lane* v. *Cobham*, *ante* 1.
(*b*) 3 *Burr.* 1610. (*c*) 1 *Term Rep.* 374.
(*d*) 3 *Term Rep.* 746.

not

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not have the benefit of the statute, without a precise finding of the fact: and he said that by dismissing the appeal in this case, the Sessions have in effect drawn the conclusion that this parish cannot have the benefit of the statute of *Elizabeth*.

Lord ELLENBOROUGH C. J. If I were to draw any conclusion from the facts here stated, it would rather be the contrary conclusion: for down to the year 1739 it is certain that the parish had the benefit of the stat. 43 *Eliz.*, and it does not appear but that they had the same down to 1753; and since that time it appears that the population of the parish has decreased: from all which I should be led to conclude that they might the more easily have the benefit of the statute. I know that different opinions have at different times prevailed as to the better [217] policy of providing for the poor in larger or in smaller districts: but I had rather guide myself by the words of the act of parliament, and by the fact, than by any fluctuating policy which sometimes leans one way and sometimes another. Whether a parish can or cannot have the benefit of the statute is a fact, which the Sessions ought to find upon all the circumstances laid before them, and not leave us to presume it how we may. Then have the Sessions here found the fact; or have they stated those facts from whence we must necessarily see that the parish cannot have the benefit of the statute? They have not done either. The case must go back to them to find the fact. The enacting words of the statute 13 & 14 *Car.* 2. *c.* 12. *s.* 21., though general, must be taken to refer to parishes so circumstanced.

LAWRENCE J. observed, that in *Rex* v. *Leigh* (*a*) it did not appear but that even prior to the time there mentioned the poor of the parish had been provided for under the stat. 13 & 14 *Car.* 2. (*c.* 12. *s.* 21.); from whence it might be inferred, that the parish never had had the benefit of the statute of *Elizabeth:* whereas here it was found, that prior to the year 1739 they always had the benefit of it.

Per Curiam, Let the case go back to the Sessions to be re-stated.

(*a*) 3 *Term Rep.* 716.

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The KING *against* DOBSON and Another.

Saturday, Feb. 8th.

AN information for a misdemeanor at common law, filed by the Attorney-General against the Defendants, for a fraud committed by them in the collection of the assessments under the Property-tax act 43 *G.* 3. *c.* 122. stated in the first count, that the defendants before and *at the time of committing the offences* hereinafter first and secondly mentioned *were collectors of certain* duties payable to the King under the stat. 43 *G.* 3. &c. That *being such collectors*, the defendants, not regarding their duty *as such collectors*, but unlawfully intending to cheat and defraud one A. P. with force and arms, on, &c. at, &c. did *by colour and pretence of their said office* unlawfully and fraudulently, &c. demand and exact from the said A. P. 5*l.* 5*s.* as and for duties payable by him to the defendants *as such collectors*, &c. whereas the said sum so demanded and exacted was not, nor was any money then and there payable by A. P. as and for duties to the defendants *as such collectors*, &c.: and that the defendants afterwards converted the said 5*l.* 5*s.* to their own use; in contempt, &c. The 2d count was the same, except that it did not charge the defendants with converting the money to their own use. The 3d count charged, that the defendants intending to cheat and defraud A. P., with force and arms, on, &c. at, &c. did *by colour and pretence of the said defendants being collectors of certain dues* payable to the king by virtue of the said act, unlawfully and fraudulently, &c. demand and exact of and from A. P. 5*l.* 5*s.* as and for duties payable by him to the defendants for the King's use, by virtue of the said act, &c.: and did then and * there, in pursuance of such demand and exaction, unlawfully and fraudulently, &c. receive from A. P. 5*l.* 5*s.*: whereas the said sum was not, nor was any sum then and there payable by A. P. as and for duties to the defendants for the King's use under the said act, &c.: and that the defendants afterwards converted the said sum to their own use, in contempt, &c. The 4th count was the same, only not charging that the defendants converted the 5*l.* 5*s.* to their own use.

One who was appointed collector of certain duties by the proper constituted authorities, and who considered himself, and was considered by the commissioners to be such collector, but whose appointment turned out to have been informally made, cannot be indicted at common law for the receipt of duties *by colour and pretence of being collector* of such duties: though the money were fraudulently collected and misapplied by him; because he was *in fact* appointed collector, and in that character received the money. And quære whether the stat. 43 *Geo.* 3. *c.* 99. *s.* 19. having enacted that no collector, &c. employed in the execution of that act shall be liable by reason of such execution to any *penalty* other than such as by that and another act may be inflicted does not take away the common law remedy by indictment for offences against the acts,

A fifth [*219]

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A 5th count charged, that the defendants as common cheats, for the sake of unlawful gain and lucre to themselves, pretending that 5*l.* 5*s.* was due for certain duties from A. P. as the occupier of certain lands, &c. required him to pay the same to the defendants *as collectors*, &c. which A. P. did accordingly pay: whereas the said lands, &c. were not charged to the said duties, and the said sum was not due from A. P.; and that the defendants afterwards converted the said sum to their own use. And a 6th count corresponded to the last, only omitting the charge of converting the money to their own use.

At the trial before *Chambre* J. at *York* it appeared that the defendants had been in fact appointed collectors of the duties under the Property-tax act 43 *Geo.* 3. *c.* 122. for the township of *Pickering* in the *North Riding*, for the year 1803, ending 5th of *April* 1804. And they did in fact make their collection in the district from the persons assessed, and also collected 5*l.* 5*s.* from A. P. mentioned in the information, whose name was not in the commissioners' assessment, and which sum was not accounted for. It was however objected at the trial, that as the defendants were not proved to have been regularly appointed collectors by warrant under the hands and seals of the commissioners, as required by the stat. 43 *Geo.* 3. *c.* 99. *s.* 12. by reference from the re-enacting clause (*s.* 2.) of the Property-tax act 43 *Geo.* 3. *c.* 122. they could not be convicted upon those counts charging them with the commission of the offence *as collectors;* they were accordingly convicted on the 3d and 4th counts, which only charged that they did the act *by colour and pretence of their being collectors*, and were acquitted upon all the other counts. And on a former day

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Heywood Serj. obtained a rule nisi for a new trial, upon the ground that the defendants having been in fact appointed collectors of the duties, and having committed the offence imputed to them in that character, could not be convicted of a misdemeanor at common law, the charge being of an offence within the stat. 43 *Geo.* 3. *c.* 99. *s.* 51. in "having received the duties of a person not charged therewith;" and the 19th section of the same act having provided, "that no commissioner, assessor, or collector who shall be employed in the execution of any such act or acts herein mentioned, or of this act, shall be liable for or by reason of such execution to any *penalty* or *penalties* other than such as by this act, or the said act or acts, are or may be inflicted."

inflicted." And sect. 51. enacts, " that no collector of any of " the duties therein mentioned shall collect the same by any " rate or book other than such as shall be signed and allowed " by such commissioners, &c. And that in case any such col- " lector shall collect the same by any other rate or book, or " shall receive such duties from any person not charged there- " with, or shall collect from any person more money than is " actually charged in such rate or book, after the same has " been signed and allowed, &c.; every such collector shall for " every such offence forfeit 100*l.*"

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The Solicitor-General, (with whom were *Cockell* Serjt., *Park,* and *Wood,*) contended, 1st, That the word " *penalties* " in the statute meant only " *pecuniary* penalties," and could not be meant to exempt an offender against the statute from being punished by indictment or information at common law: for otherwise this absurd consequence would ensue, that though a collector had cheated the public or the crown of 1000*l.* or more, he could only be liable to the penalty of 100*l.* given by the 51st section. There is certainly some obscurity in the wording of the statute; but the difficulty might be obviated by the Attorney-general remitting any penalty which might be inflicted upon an indictment or information beyond the amount limited by the statute, if more were imposed; or if the penalty had been before recovered in any other proceeding. In 2 *Hawk. ch.* 25. *s.* 4. it is said that " Where a statute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment or action of debt, or information, &c. without mentioning an indictment, it seems to be settled at this day that it will not maintain an indictment; because the mentioning the other methods of proceeding only seems impliedly to exclude that of indictment. Yet it hath been adjudged, that if such a statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorizes a proceeding by way of indictment. Also where a statute adds a further penalty to an offence prohibited by the common law, there can be no doubt, that the offender may still be indicted, if the prosecutor think fit, at the common law." Now the offence of which the defendant stands convicted was an offence at common law, and the statute only superadds a penalty in the particular instance. [221

Le Blanc J. observed, that the difficulty here arose from the [222]

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negative words of the 19th section. And by Lord *Ellenborough* C. J. the word *penalty*, (*a*) in its large and legal sense, includes every species of punishment, corporal as well as pecuniary. And therefore if a statute repeals all *penalties* generally in respect of any offence, it will repeal corporal as well as pecuniary punishment. [Though the meaning of the word may be narrowed by the context.] Here the other provisions of the act, and the obvious meaning of the legislature, shew that the word *penalties* was meant to be confined to *pecuniary* penalties. But, 2dly, The defendants were not proved to be legally appointed *collectors;* and upon objection taken at the trial they have been acquitted upon those counts charging the offence to have been committed by them in that character; and they now stand convicted only of the offence of receiving the money *under colour and pretence of being collectors:* the objection therefore upon the statute does not arise; for it is no offence within it unless committed by persons duly appointed collectors. [Lord *Ellenborough* C. J. If they acted as collectors, it would be sufficient to charge them criminally with a breach of duty in that character. But here they stand acquitted in their character as collectors.]

Heywood Serjt. and *Holroyd*, after some few observations, principally upon the manner in which the case had been left to the jury, which they said did not warrant the distinction which had been since adopted in entering up the verdict, were stopped by the Court.

[223] Lord ELLENBOROUGH C. J. The question is reduced to this, Whether the evidence supports the finding of the jury upon counts charging the defendants with having unlawfully and fraudulently received the duty from the person named *by colour and pretence of their being collectors of certain duties?* Now, *by colour and pretence* must be understood what the parties knew at the time of the receipt to be *colour and pretence;* but that does not apply to the situation of the defendants who were in fact appointed by the constituted authorities, though in an informal manner, to act as collectors in the receipt of the duties. They were therefore entitled to the benefit and protection which the act meant to extend to persons acting in that

(*a*) *Heywood* Serjt. afterwards referred to *Johnson's* Dict. *Blac. Com.* and *Cro. Jac.* 414, 415. in corroboration of the extensive signification of this word.

character,

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character. The commissioners thought they were proper officers, and the defendants thought themselves such. The imputation therefore of *colour and pretence*, conveyed by the third and fourth counts, does not apply to them, and therefore the conviction on those counts cannot be sustained.

Grose and *Lawrence*, Justices, declared themselves of the same opinion.

LE BLANC J. I consider the 19th section as holding out a protection to all officers employed in the execution of the acts, amongst others to collectors; and therefore if the commissioners have omitted any formality in the defendant *Dobson's* appointment, whom they have in fact appointed a collector, that will not authorize them to take advantage of the defect, and prosecute him as if he were no collector, but had merely acted by colour and pretence of being such, when all parties considered him, as he considered himself, at the time to be duly invested with that character.

Rule absolute for a new trial.

1806.

RUSHFORTH and Others, Assignees of RUSHFORTH, *against* HADFIELD and Others.

Saturday, Feb. 8th.

Where no lien exists at common law it can only arise by contract with the particular party, either express or implied: it may be implied either from previous dealings between the same parties upon the footing of such a lien, or even from a usage of the trade so general as that the jury must reasonably presume that the parties knew of and adopted it in their dealing.

But where, as in the case of a common carrier claiming a lien for his general balance, such a lien is against the policy of the common law and the custom of the realm which only gives him a lien for the carriage price of the particular goods, there ought to be very strong evidence of a general usage for such a lien to induce a jury to infer the knowledge and adoption of it by the particular parties in their contract: and the jury having negatived such a general usage, though proved to have been frequently exercised by the defendant and various other common carriers throughout the North for 10 or 12 years before, and in one instance so far back as 30 years, though not opposed by other evidence, the Court refused to grant a new trial.

THIS was an action of trover to recover the value of a quantity of cloth which the bankrupts had sent by the Defendants as common carriers, who claimed a lien upon it for their general balance due to them as such carriers for other goods before carried by them for the bankrupts. The Plaintiffs had tendered the carriage price of the particular goods in dispute, and the sole question was, Whether the defendants as common carriers, had a lien for their general balance. On the first trial a verdict was found for the defendants, which this court thought was not sustained by the evidence, and therefore they granted a new trial. (*a*) The cause was again tried at the last assizes at *York*, before *Chambre* J., When the defendants' book-keepers in *London*, at *Stamford*, and at *Haddersfield*, swore to their practice to retain goods for their general balance, and particularized one instance in *December* 1799, where an action was brought, which being referred, was decided on another point: a second in *May* 1800, where there was no bankruptcy: a third in *May* 1803, where the bankrupt's assignee demanded the goods, but afterwards paid the balance: a fourth and a fifth in the same year, when the individuals paid the balance, but no bankruptcy intervened: and a sixth instance of the like sort as the last in 1804. In addition to these, * *Welch*, a carrier from *Manchester* and *Leeds*, deposed to an instance of retention of goods for the general balance three years back, where a bankruptcy intervened, and the assignees disputed the payment at first, but afterwards paid the balance; and to two other instances of goods sent to *Glasgow*; one where the car-

(*a*) *Rushforth and another, Assignees, &c.* v. *Hadfield*, 6 *East*, 519.

riage

riage of the particular goods was 3*l.* and the general balance 20*l.*; another where the carriage was a few shillings, and the general balance 8*l.*; in both instances bankruptcies intervened, and the assignees paid the general balance. *Hanley*, a *North-allerton* carrier, spoke to two instances of retainer of goods 12 and 13 years ago till the individuals paid the general balance; but neither were bankrupts. The book-keeper of *Pickford*, a carrier from *London* to *Liverpool*, particularized an instance of retaining for the general balance in 1792, where the vendee became bankrupt; but there the vendor stopped in transitu, and he paid the general balance at the end of two months: a second similar instance in the same year: a third instance in 1795, where the senders became bankrupts, and their general balance was paid by the vendees: a fourth in 1795, where the goods of an individual, not bankrupt, were detained several years; but no account how the matter was finally settled: and two other like instances in 1794 and 1795. And *Clark* a *Leicester* carrier also mentioned two instances, one in 1775, the other afterwards, of retaining the goods of solvent individuals till they paid their general balance. All these carriers, who had followed their occupation from 20 to 30 years and upwards, deposed generally to their custom of retaining goods for their general balance in other instances as well as in those particularized. It was left to the jury to decide whether the usage were so general as to warrant them in presuming that the bankrupts knew it, and understood that they were contracting [226] with the defendants in conformity to it; in which case they were to find for the defendants: otherwise they were told that the general rule of law would entitle the plaintiffs to a verdict. On this direction the jury found for the plaintiffs; which was moved to be set aside in last *Michaelmas* term, as a verdict against all the evidence.

Cockell Serjt. now shewed cause against the rule. This was a question for the jury, which, having been properly submitted to them, their verdict must decide. In the absence of all evidence of any particular dealing between these parties, they must be taken to have dealt upon the general custom of the realm with respect to carriers. Where a carrier means to limit his common law responsibility, he advertises his particular mode of dealing in the public papers, and affixes notices of it in his office and about the town where he dwells, and from these notices

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notices, as well as from parol evidence of the general notoriety of his mode of dealing, it may be presumed that the party who employed him, living within the reach of such information and notoriety, has the same knowledge which persons in general of the same place are thus proved to have had. The same sort of evidence then is as necessary where a carrier insists on extending his lien beyond the custom of the realm, in order to bring home the knowledge of such a particular mode of dealing to the party who employs him, from whence his implied assent to deal upon such terms may be inferred. In this view a few solitary instances of what other carriers have done at other distant places weigh little or nothing as to the point of inferring from them the knowledge of the bankrupt that such must have been the mode of dealing of the defendants: and the rest of the evidence was defective both in the number and notoriety of the instances calculated to bring such knowledge home to him. Several of the instances do not apply, where the motive for having paid the general balance may be resolved into the convenience or benefit of the party applying for the particular goods; and the only strong instances are cases of insolvency and bankruptcy, where the relative magnitude of the respective claims of the carrier and consignee might induce a temptation to resist the carrier's lien; but these are very few either in number or importance, from whence to draw the conclusion of knowledge in the bankrupt.

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Park and *Wood* contrà. The evidence given was in conformity to the principle laid down by the Court in this case upon the former rule for a new trial, in support of the carriers' claim, and was not contradicted by any other evidence. The Court there thought that a general usage in trade affecting the custom of the realm ought to be proved by the practice of different carriers in different parts of the country; and that the knowledge of the individual customer might be inferred from the generality of the usage. The evidence therefore of the practice of the different carriers throughout all that part of the kingdom was material to the point in issue, and was the only proof which the nature of the case admitted of. There have been many instances, such as those of the dyers, (*a*) the packers, &c. where liens for the general balance have been established by the general usage of trade even for twenty years

(*a*) Vide *Savill* v. *Barchard*, 4 *Esp. N. P. Cas.* 53.

before,

before, which did not exist at common law, where the proof was of the same sort as in this case: and here the usage was carried back as far as 1775. It is in vain to say that a general usage in a trade will bind those who * employ the traders, if the evidence, though uncontradicted, may be disregarded by the jury.

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Lord ELLENBOROUGH C. J. It is too much to say that there has been a general acquiescence in this claim of the carriers since 1775, merely because there was a particular instance of it at that time. Other instances were only about 10 or 12 years back, and several of them of very recent date. The question however results to this, What was the particular contract of these parties? And as the evidence is silent as to any express agreement between them, it must be collected either from the mode of dealing before practised between the same parties, or from the general dealings of other persons engaged in the same employment, of such notoriety as that they might fairly be presumed to be known to the bankrupt at the time of his dealing with the defendants, from whence the inference was to be drawn that these parties dealt upon the same footing as all others did, with reference to the known usage of the trade. But at least it must be admitted that the claim now set up by the carriers is against the general law of the land, and the proof of it is therefore to be regarded with jealousy. In many cases it would happen that parties would be glad to pay small sums due for the carriage of former goods, rather than incur the risk of a great loss by the detention of goods of value. Much of the evidence is of that description. Other instances again were in the case of solvent persons, who were at all events liable to answer for their general balance. And little or no stress could be laid on some of the more recent instances not brought home to the knowledge of the bankrupt at the time. Most of the evidence therefore is open to observation. If indeed there had been evidence of prior dealings between these parties upon the footing of such an extended lien, that would have furnished good evidence for the jury to have found that they continued to deal upon the same terms. But the question for the jury here was, whether the evidence of a usage for the carriers to retain for their balance were so general as that the bankrupt must be taken to have known and acted upon it?

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And they have in effect found either that the bankrupt knew of no such usage as that which was given in evidence, or knowing, did not adopt it. And growing liens are always to be looked at with jealousy, and require stronger proof. They are encroachments upon the common law. If they are encouraged, the practice will be continually extending to other traders and other matters. The farrier will be claiming a lien upon a horse sent to him to be shod. Carriages and other things which require frequent repair will be detained on the same claim; and there is no saying where it is to stop. It is not for the convenience of the public that these liens should be extended further than they are already established by law. But if any particular inconvenience arise in the course of trade, the parties may, if they think proper, stipulate with their customers for the introduction of such a lien into their dealings. But in the absence of any evidence of that sort to affect the bankrupt, I think the jury have done right in negativing the lien claimed by the defendants on the score of general usage.

GROSE J. This lien is attempted to be set up by the defendants, not upon the ground of any particular contract or previous transactions between them and the bankrupt, but on
[230] the ground of previous transactions between them and other parties, and between other carriers and their customers. And it is admitted that the question upon this evidence was properly left to the jury, that they might find a verdict for the defendants, if the usage for the carriers to retain for their balance of account were so general as that they must conclude that these parties contracted with the knowledge and adoption of such usage. The jury have found in the negative. And I take it to be sound law that no such lien can exist, except by the contract of the parties expressed or implied.

LAWRENCE J. The most which can be said on the part of the defendants is, that there was evidence which might have warranted the jury to find the other way; but it was for them to decide. This is a point which the carriers need not be so solicitous to establish. It is agreed that they have a lien at common law for the carriage price of each particular article. If then it be not convenient for the consignee to pay for the carriage of the specific goods at the time of delivery, it is very easy for the carriers to stipulate that they shall have a lien for their balance

lance upon any other goods which they may thereafter carry for him. It is not fit to encourage persons to set up liens contrary to law. The carriers' convenience certainly does not require any extension of the law; for they have already a lien for the carriage price of the particular goods, and if they choose voluntarily to part with that, without such a stipulation as I have mentioned, there is no reason for giving them a more extensive lien in the place of that which they were entitled to. I should not be sorry therefore if it were found generally that they have no such lien as that now claimed upon the ground of general usage.

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LE BLANC J. This is a case where a jury might well be jealous of a general lien attempted to be set up against the policy of the common law, which has given to carriers only a lien for the carriage price of the particular goods. The party therefore who sets up such a claim ought to make out a very strong case. But upon weighing the evidence which was given at the trial, I do not think that this is a case in which the Court are called upon to hold out any encouragement to the claim set up, by overturning what the jury have done, after having the whole matter properly submitted to them.

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Rule discharged.

LUNDIE

1806.

Monday, Feb. 10th.

LUNDIE *against* ROBERTSON.

An indorsee three months after a bill became due, demanded payment of the indorser, who first *promised to pay it if he would call again with the account*, and afterwards said that *he had not had regular notice, but as the debt was justly due he would pay it:* held that the first conversation being an absolute promise to pay the bill, was prima facie an admission that the bill had been *presented* to the acceptor for payment *in due time*, and had been *dishonoured*, and that due *notice* had been given of it to the indorser, and superseded the necessity of other proof to satisfy those averments in the declaration; and that the second conversation only limited the inference from the former so far as to want of regular notice of the dishonour to the defendant went, which objection he waved.

THIS was an action by the indorsee against the indorser of a bill of exchange drawn on the 24th of *September* 1804 by *J. Bell* upon *R. Atkinson*, for 17*l.* 13*s.* in favour of *R. Stokoe* or order, at 65 days after date; which was accepted by *Atkinson*, indorsed by *Stokoe* to the Defendant, and by the defendant to the Plaintiff. The declaration contained the common averment, "that *when the bill became due*, according to the tenor thereof, viz. on the 1st of *December* 1804, the said bill so accepted and indorsed *was presented to* R. Atkinson *for payment*, which was refused; *of all which said premises the defendant had notice*, by means whereof and according to the usage and custom of merchants, he became liable," &c. And it also contained, amongst other common money counts, one on an account * stated. At the trial before *Chambre* J. at *Newcastle*, a witness proved that in *April* 1805 he called by the plaintiff's desire on the defendant for payment of the bill then long past due. The defendant said, he had not cash by him at that time, *but if the witness would call in a day or two and bring the account*, (by which was understood an account of the expences, a letter having been written and an affidavit of the debt made,) *he would pay it*. The witness then shewed the defendant the bill, which he took into his hand. And the witness called again in a day or two, when the defendant offered to give him a bill on *London* for the debt and expences, which the witness declined accepting. The defendant then said that *he had not had regular notice, but as the debt was justly due he would pay it*. No witness was called to prove that notice of the dishonour of the bill had been regularly given to the defendant; but the learned judge, on objection being taken to the insufficiency of the evidence adduced, thought that the declarations of the defendant rendered any further proof in that respect unnecessary, and thereupon a verdict was given for the plaintiff; which was moved to be set aside in last *Michaelmas* term upon the ground, that there was no evidence of the bill having been presented to the acceptor for payment when due, and refused; nor of notice to the defendant of the dishonour of the bill, as

alleged

alleged in the declaration. And that the subsequent promise to pay the bill was made, for aught appeared, without knowledge of the fact of non-presentation of it by the plaintiff for payment when due, by which he had made it his own; and consequently the promise was void, as made under a mistake of the fact: or if available at all in respect of the prior consideration, it must be so as a new and special undertaking which ought to have been declared on specially, and could not operate to set up [233] the bill again from which the defendant was once discharged by the plaintiff's laches.

Littledale now shewed cause. The fact that the bill when due was presented to the acceptor for payment, and refused, may be inferred by the jury from the circumstances of the case, viz. that the holder had the bill in his hands long after it was due, and that no ojection was made by the defendant when it was tendered to him on the score of the non-presentation of it to the acceptor, but only that he had not had notice of the dishonour of it. But if there were any doubt of that, the subsequent promise to pay is a waver as well of that as of the other objection of want of due notice of the dishonour of the bill. And this is not like *Blesard* v. *Hirst*, (*a*) or *Goodall* v. *Dolley*; (*b*) for in both those cases the circumstance unknown to the defendants, and which they could not be presumed to know, at the time of the subsequent promise to pay, and which avoided such promise, was, that the bill had not been presented for payment; whereas here the bill was returned back to the defendant so long after it became due, that he must have known that something was wrong, and was therefore put upon his guard to make enquiries if he were not already before apprised of the circumstances. And so far was the defendant from being taken by surprise, that the second time when the witness called by appointment the defendant stated that *he had not had regular notice*, notwithstanding which *as the debt was justly due he would pay it*. Whatever doubt therefore there might have been upon the first promise, the second must be taken to be an express waver of all objection. Then as to the [234] effect of such a promise, supposing the defendant had been once discharged from his legal obligation to pay the bill by the laches of the plaintiff, it cannot be doubted that he might wave

(*a*) 5 *Burr.* 2670. (*b*) 1 *Term Rep.* 712.

the

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the want of notice, and promise to continue liable *upon the bill;* and such a promise dispenses with the proof of presentation for payment in due time to the acceptor, his refusal to pay, and due notice thereof to the defendant. The statute 3 & 4 *Ann. c.* 9. does not liquidate the debt for want of due notice; but there remains a good consideration for a subsequent promise; in like manner as a promise by a certificated bankrupt to pay an antecedent debt is good. But at any rate the plaintiff would be entitled to recover on the count for the account stated.

Williams, in support of the rule relied principally upon the objection that there was no evidence that the bill had been presented for payment in due time, which was alleged, and necessary to be proved by the plaintiff, and could not be presumed from the silence of the defendant. And this cannot be supplied by the subsequent promise; for according to the cases mentioned a promise to pay, made under ignorance of a fact which would discharge the defendant from all liability on the bill, will not set it up again. Now the plaintiff's having the bill in his hands three months after it was due merely raised a presumption that it had been dishonoured, but not that it had been presented for payment in due time. It might have been otherwise if the bill had been very recently over-due. The defendant might think it incumbent on him to wave the want of personal notice to himself in due time, if he supposed that
[235] the plaintiff had used all due diligence to get payment from the acceptor; and the subsequent promise is only a waver of such notice; but the defendant cannot be presumed to have been cognizant of a fact which passed between the plaintiff and the acceptor; and therefore the promise can be no proof of the defendant's admission, that the bill was presented in due time; and if he were ignorant of that fact, the promise was nugatory. But even if he had known of the laches, the promise to pay could be no proof of the fact of such a presentation for payment, which being distinctly alleged must be proved, whatever other remedy might arise upon a promise so made. It could only have the effect of restoring to the plaintiff the right of action which he had lost by his laches, and putting him in a capacity to sue; but it could not supply the proof of a distinct allegation. Then the count for an account stated cannot be drawn in aid; for the trial proceeded altogether upon the count

on

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on the bill, and nothing was submitted to the jury upon the other count. And if the plaintiff be only entitled to recover on the promise and not on the bill, he should have declared specially. Where one guarantees the debt of another the action is supported upon the promise itself, and it would not be competent to give the promise in evidence upon the common counts. 1 *Saund.* 211. *n.* 2.

Lord ELLENBOROUGH C. J. The case does not admit of any doubt. The defendant is charged as the indorsee of a bill of exchange, and when applied to for payment, he says he has no cash by him then, but if the witness will call again and bring the account with him, he will pay it. Now when a man against whom there is a demand promises to pay it, for the necessary facilitating of business in transactions between man and man, every thing must be presumed against him. It was therefore to [236] be presumed prima facie from the promise so made that the bill had been presented for payment in due time and dishonoured, and that due notice had been given of it to the defendant. But taking the subsequent conversation as connected with the former, the only limitation of it would be, that the defendant stated that he had not had regular notice of the dishonour; but even that objection was waved in the same breath; for the defendant said, that as the debt was justly due he would pay it. Then it stands on the first conversation, as an absolute promise to pay the bill; thereby admitting (for I do not put it on the ground of waver of any objection to the non-presentation of the bill in due time as existing in fact) that there did not exist any objection to his payment of the bill; but that every thing had been rightly done. That supersedes the necessity of the ordinary proof. And though an objection was stated in the second conversation to the want of regular notice, yet that objection was immediately waved.

Per Curiam, Rule discharged. (*a*)

(*a*) "If an indorsee has neglected to demand of the drawer in a convenient time, a subsequent promise to pay by the indorser will cure this laches;" by Lord *Raymond* C. J. in *Haddock* v. *Bury, Middlesex, Trin.* 3 *Geo.* 2. MS. *Burnet* J.

1806.

Tuesday, Feb. 11th.

IGGULDEN *against* MAY. (*a*)

One, in consideration of 5*l.* 8*s.* in nature of a fine and of a yearly rent of 6*s.* 9*d.*, demised certain ground, with the buildings, &c. for 21 years, with a proviso for distress if the rent were in arrear for 14 days. And the lessor covenanted at the end of 18 years of the term, or before, on request of the lessee, to grant A new lease of the premises "for the like fine, for the like term of 21 years, at the like yearly rent, *with* ALL *covenants, grants, and articles, as in that indenture were contained.*"

THIS was an action of covenant by the Plaintiff, claiming by assignment from the original lessees, against the Defendant claiming by assignment from the original lessor, upon a covenant contained in a certain indenture of lease, dated the 29th of *September* 1783, whereby one *John Dilnot*, in consideration of the payment of 5*l.* 8*s.* in the nature of a fine, and also in consideration of the yearly rent thereinafter reserved, demised to *John Iggulden*, *Elizabeth Fleetwood*, and *Sarah Iggulden*, twenty-seven perches of ground, and the several messuages or tenements, out-houses, and buildings thereon, or on part thereof, situate in *Deal*, in the county of *Kent*, habendum, &c. unto the lessees, their executors, &c. for the term of 21 years; reddendum yearly during the said term to *J. Dilnot*, his heirs, &c. the yearly rent of 6*s.* 9*d.* at *Michaelmas*. And that if the said rent should be in arrear for 14 days next after any *Michaelmas* day during the said term, it should be lawful for *J. Dilnot*, his heirs, &c. to enter and distrain, &c. And *J. Dilnot*, for himself, his heirs, &c. covenanted and granted to the lessees, their executors, &c. " that the said *J. Dilnot*, his heirs and assigns, *at the end of* 18 *years of the said term of* 21 *years*, or before, upon request to him or them made by the said *J. Iggulden*, *E. F.*, and *S. I.*, *their executors, &c. and at the costs and charges of the said *J. Iggulden*, &c. their executors, &c. *should and would make, seal, and deliver unto the said* J. Iggulden, E.F. and S. I., *their executors, &c.* A *new lease of the said* 27 *perches of ground*, with the appurtenances, *for the like fine or consideration of* 5*l.* 8*s. for the like time and term of* 21 *years, at the like yearly*

Held that this covenant was satisfied by the tender of a new lease for 21 years containing *all* the former covenants *except the covenant for future renewal*. And held than an averment that the covenant for renewal in the indenture declared on corresponded with *various other leases*, before then successively made by the owners of the inheritance for the time being, could not be taken in aid to construe the meaning of the indenture: for supposing such evidence were admissible in any case where the renewals had been uniformly the same, yet non constat from this averment that *all* the former leases contained the sam covenant for renewal.

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(*a*) *Vide* this case in Equity, 9 *Ves. jun.* 325. Lord Chancellor retained the bill for a lease with a covenant for renewal, with liberty to bring this action.

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rent of 6*s.* 9*d.* payable as is aforesaid, *with* ALL *covenants, grants, and articles as in the then present indentures were contained,*" (meaning the said indenture now brought here into court as aforesaid, and the counterpart thereof.) By virtue of which demise the said lessees entered and became possessed for the said term; the reversion thereof belonging to *J. Dilnot* in fee. The declaration then stated, that the said term during the continuance of it, became vested in the plaintiff through several mesne assignments, and that the reversion of the premises became vested in the defendant in fee by conveyance. And then the plaintiff averred, that the aforesaid indenture of lease contained *no other covenant, grant, article, or clause* than such as are herein-before set forth, and that the covenants, grants, and articles in that indenture contained *correspond* (except as to the date and names of the parties) with those expressed in *various other leases before then successively made and executed* of the premises comprised in the said first-mentioned indenture by the owners for the time being of the inheritance thereof, *on renewals from time to time granted* by such owners, at the like yearly rent of 6*s.* 9*d.* in consideration of a like sum of 5*l.* 8*s.* paid in the nature of a fine *upon every such renewal.* And then the plaintiff assigned as a breach, that after the assignment of the reversion to the defendant, and whilst the plaintiff continued so possessed of the demised premises, and before the end of 18 years of the said term of 21 years granted by the said indenture, *viz.* on the [239] 21st of *September* 1801, he (the now plaintiff) gave notice to the defendant of the demised premises having been so assigned to the plaintiff, and requested the defendant, as assignee of the reversion, at the costs of the plaintiff, to give him a new lease of the premises, for the like fine of 5*l.* 8*s.*, for the like term of 21 years, at the like yearly rent of 6*s.* 9*d.*, payable, &c. *with all covenants, grants, and articles, as in the said indenture of lease were contained,* and *particularly with such covenant for renewal as is contained therein,* under the like terms as expressed in that indenture, according to the form and effect of the same. And though the plaintiff was ready and willing, and offered to the defendant to pay the costs of such new lease, and to pay him such fine of 5*l.* 8*s.*, yet the defendant did not give him such new lease with *all* covenants, &c., but on the contrary refused to make the plaintiff a new lease containing any covenant for further

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further renewal, contrary to the form and effect of the said indenture and covenant, &c.; to the plaintiff's damage of 1000*l.*

The defendant by his plea, after craving oyer of the indenture of demise, and protesting that the covenants, grants, and articles therein do not correspond with those expressed in various other leases before then successively made of the premises comprised in that indenture by the owners for the time being of the inheritance thereof, upon renewals from time to time granted by such owners, as in the declaration is alleged; pleaded, that since he became seised of the reversion, and the plaintiff became possessed of the residue of the said term, he the defendant has been and is willing to grant the plaintiff a new lease of the premises, with all such covenants, grants, and articles as in the
[240] said indenture of demise are contained, *excepting only the covenant for renewal.* And then he stated, that, when so requested, he did make to the plaintiff a new lease with all such covenants, &c., except only the covenant for renewal; of which he gave notice to the plaintiff, who refused to accept the same. The plea then set forth verbatim the new lease so made and tendered by the defendant, (which was the same as the former, excepting the covenant for renewal;) and averred, that the premises comprised in the latter were the same as those in the former indenture. To this there was a general demurrer, and joinder.

This case was argued in *Easter* term last by *Marryat* in support of the demurrer, and *Abbott* contrà. But as the Court in giving judgment went very fully into the case, and noticed the principal arguments; and as all the authorities which were cited are collected in the report of the same case in the Court of Chancery, in 9 *Ves. jun.* 325. and in Mr. *Hargreave's* argument in the case of *Lord Inchiquin* v. *Burnel*, *Harg. Jur. Arg.* 411. it is unnecessary to repeat them. The case stood over for consideration till this term, when

Lord ELLENBOROUGH C. J. delivered the opinion of the Court. After stating the pleadings—The question arising upon the whole of the record is, Whether the plaintiff were entitled to have a lease executed to him *containing the covenant of renewal?* And which question itself depends upon the intent of the parties, as it is to be collected from an instrument inaccurately

accurately framed, and from its shortness affording little matter from whence arguments can be drawn to explain its meaning.

*The rules of construction applicable to covenants are so well known, that it is hardly necessary to cite authorities to shew that every covenant is to be expounded with regard to its context; that such exposition must be upon the whole instrument, *ex antecedentibus et consequentibus*, and *according to the reasonable sense and construction of the words*. *Plowd.* 329. In conformity to which rules, and in support of the apparent intent of the parties, covenants in large and general terms have been frequently narrowed and restrained. The cases of *Cage* v. *Paxton*, 1 *Leon.* 116. and *Broughton* v. *Conway Moor* 58., are authorities to this effect. Having referred generally to these cases for the ground upon which the present may be decided, it is to be seen whether that part of the covenant relied on by the plaintiff, viz. "to grant a new lease with *all* the covenants of the then granted lease," is not to be narrowed so as to except that particular covenant. And though some attempts were made in argument to shew that the indenture itself contained some particulars from which *an intention to covenant* for a perpetual renewal might be collected, they appeared to us of too slight a nature to afford any solid foundation for such an inference; and that the case necessarily resolves itself into this question, viz. whether a covenant to grant a new lease with *all* covenants can be satisfied by a lease with *all* covenants *except the covenant for renewal*. The argument, that a covenant for a lease with *all* the covenants cannot be satisfied by a lease with *all but one*, will have no weight, if according to the fair construction of the lease, that one covenant should be found to have nothing to do with the subject-matter to be granted. The covenant is, "at the end of 18 years of the term of 21 years" granted by the lease, to grant "A new lease for the like time and term of one-and-twenty years, with ALL *covenants*, grants, and articles, *as in that indenture contained*." The subject-matter therefore of the grant is *one* lease, not many; for *a* new lease is the same as *one* new lease; and if the parties intended to contract for one lease, there can be no doubt that the covenants to be introduced must be commensurate with the duration of such lease, and suited to the subject-matter of the grant. And the words, "with all covenants, grants, and articles, as in the

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then present indentures were contained," so understood, amount only to a loose and general mode of expressing in substance, what follows, viz. " with all such provisions relative to the " enjoyment of the *new* lease for 21 years as are contained in " the present lease, relative to the now subsisting term of 21 " years." If the continued grant of successive leases, and not the grant of one only, were intended, it is natural to expect that words should have been used distinctly marking a right of repeated renewal, instead of expressions more immediately applicable to the case of a single additional lease. The argument for the defendant rests upon that which is not the natural construction of such a covenant: it is a construction which, without any apparent consideration for a grant in such extent, leads virtually to a grant in perpetuity: whereas the other construction leads only to a single renewal for the same period of time; and therefore is a much more reasonable construction, and prima facie more entitled to adoption on that account than the former. The case on the part of the plaintiff supposes that it was the intention of the parties to express what, if they had so intended, might have been expressed, without difficulty or ambiguity, by words which would have obviously occurred to the most unexperienced draftsman. Had the words, " and so from time to " time," been added after " at the end of 18 years of the said
[243] term of 21 years or before," this design in the parties would have been easily and unequivocally pointed out. Possible cases may be put in which a grant, such as the plaintiff contends for, would be by no means unreasonable or absurd; as the case which was put in argument on this question in the Court of Chancery; that this might be originally unprofitable sea beach; and that it might be a good bargain for the owner to part with it, without any prospect of increasing his fine, inasmuch as while the leases were renewed the gain, though small, would be certain, and when they were at an end the lessor's possession would not be worse than it was originally: and that on the other hand it was but reasonable that if the experiment did not answer, the lessee should be at liberty to give up the spot at the end of the 21 years originally granted. But the answer to this and other supposed cases of the like kind appears to be, that if such had been the views of the parties, they would not have suffered their intention to rest on words of so ambiguous an import as those in question. Persons so attentive to their eventual

tual interest, as such parties must be supposed to have been, would hardly have provided for them by words so ill calculated to ascertain and secure the object they had in view as these appear to be. The argument built on the use of the word *covenants*, in the plural number, has not much weight; for independently of the observations which I have already made on the loose and general language of this provision, and the fair import of the whole of it taken together, the word *covenants* is in this case literally satisfied by the lessor's granting a lease with a covenant for good title, and quiet enjoyment, on his part, to the lessee; and the lessee himself being bound by no other covenant on his part than that contained in the first indenture, viz. to pay the rent; with power of entry and distress. On the cases which have been cited for the plaintiff it will not be necessary to say much; for the words of all of them differ from that in question; and in most of them an intention of perpetual renewal may be fairly collected from the context. The only case on the subject, which has yet been decided in a court of common law, is the case of *Cooke* v. *Booth*, *Cowp.* 819.; which is certainly a case very analogous to the present, both in respect of the words of covenant, on which the claim to perpetual renewal is founded, and also in respect of the fact of successive renewals of a lease similar in terms with the one claimed. In that case, however, the series of successive renewals from the first downwards was *uniform and unbroken:* in this case it is only alleged that the *covenants correspond* with those in *various* other leases successively made: which allegation as to *various* other leases might be true, although there should have been several instances to the contrary. That case was decided upon two grounds, first, that the parties themselves had by successive renewals of the lease, in all of which the covenant of renewal had been uniformly repeated in the same terms, put their own construction upon this covenant; and upon this first ground the judgment of Lord *Mansfield*, Mr. Jus. *Willes*, and Mr. Jus. *Ashhurst* proceeded. The second ground, (and on this the judgment of Mr. Jus. *Buller* proceeded,) was, that the authority of *Bridges* v. *Hitchcock*, (1 *Bro. P. C.* 522.) decided the case then in question. As to the first of these grounds, inasmuch as the fact stated respecting the successive renewals is so materially different in this case from the statement in *Cooke* v. *Booth*, this case cannot be governed thereby; even if it were competent

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competent " in any form of action to bring upon the record " *the fact*, with reference to the former leases, as explaining " the contract contained in the last lease;" upon which point very grave and serious doubts have been entertained, and which it is not now necessary to decide, (I allude to what was said by Lord *Eldon* in 9 *Ves. jun.* 335. and by the present Master of the Rolls, in *Moor* v. *Foley*, 6 *Ves. jun.* 238.) As to the second ground, the authority of the case of *Bridges* v. *Hitchcock*, (and upon which Mr. Jus. *Buller* thought the case of *Cooke* v. *Booth* ought to be decided,) that will not govern the present; for that, as has been observed in argument, did not turn upon the covenant to grant under the same covenants; but had this additional circumstance, viz. that the covenant was to grant *such* further lease *as the lessee should desire*. So that the covenant left it to the lessee himself to say *what interest he would require* to be granted to him, without any restriction or limitation, except that no covenant should be introduced not contained in the original lease. Nor was it unfair to infer from thence that he, who might have asked a lease for any number of years, did not exceed what was intended by requiring one with a covenant to renew. In *Furnival* v. *Crewe*, 3 *Atk.* 84. the words were One or more lease or leases; and so *to continue the renewing such lease or leases;* words plainly importing a repetition of renewals; and on them Lord *Hardwicke* relied. But in this case there is not one word which indicates continued renewals. In the cases of *Hyde* v. *Skinner*, 2 *P. Wms.* 196. before Lord *Macclesfield*, *Russel* v. *Darwin*, before Lord *Camden*, *Tritton* v. *Foot*, before Lord *Thurlow*, 2 *Bro.* 636. and *Moor* v. *Foley*, 6 *Ves. jun.* 232. before Sir *Wm. Grant*, there was a covenant to renew;
[246] but in all of them it was holden that there should be no perpetual renewal. And though these cases were decided in courts of equity, yet they were cases in which the Judges sitting in those courts were bound to put the same construction upon the instruments under consideration as courts of law. Upon these authorities, therefore, as well as upon the reason of the thing, we are of opinion, that the plaintiff was not entitled to require the execution of a lease to him containing the covenant of renewal; and therefore that our judgment must be for the defendant.

Judgment for the Defendant.

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CROSSE et Uxor, Administratrix of REEDER, *against* SMITH and MUNT, Executors of GRIERSON.

Tuesday, Feb. 11th.

TO debt on a bond in the penalty of 1000*l.* given by *James Grierson* to *John Reeder*, dated 10th of *May* 1793, conditioned for the payment of 500*l.* and interest at 5 per cent. on the 10th of *May* 1796, the Defendant *Munt* pleaded *plene administravit*, except as to 468*l.* 15*s.* 0*d.*; and, as to that sum, his bankruptcy and certificate; and specially alleged, that the said 468*l.* 15*s.* and no more of the effects of *Grierson*, having been received by him as such executor, were before he became bankrupt misapplied, eloigned, and wasted by him. That the Plaintiff, administratrix after *Reeder*'s death, and before her marriage with the other plaintiff *Crosse*, proved the said 468*l.* 15*s.* as a creditor under *Munt*'s commission, as a debt due from *Munt*, as such executor, to her as the administratrix of *Reeder* at the suing out of the commission, and secured by the bond in the delaration mentioned;* and that a dividend was duly declared and made under such commission, of which the plaintiff, administratrix, had notice. To this plea of the defendant *Munt* the plaintiffs replied, denying that he had fully administered, except 468*l.* 15*s.*; and also denying that the plaintiff, administratrix, proved the said 468*l.* 15*s.* as a creditor under *Munt*'s commission, as a debt, &c. secured, &c. in manner and form as alleged by the plea; and on these points issue was joined. The defendant *Smith* pleaded, 1st, *plene administravit*, except as to 4*l.* 17*s.*; and, 2dly, *plene administravit*, except the said 4*l.* 17*s.* before he had notice of the bond: and that he had not then, nor had at the time when he first had notice of the said writing obligatory, or at any time since, goods, &c. except the said 4*l.* 17*s.* To this the plaintiffs replied, taking judgment of the assets confessed; denying that the defendant *Smith* had fully administered, except 4*l.* 17*s.*; and as to his second plea, they said that the defendant *Smith* had at the time when he had first notice of the said writing obligatory, besides the said 4*l.* 17*s.*, goods, &c. to the amount of the debt: and on these points also issue was joined. This cause was tried before Lord *Ellenborough* C.J., at the sittings after *Trinity* term 1805, when a verdict was found for the defendant *Munt*, and for

An executor administering, having once received money, assets of his testator, cannot discharge himself under the plea of plene administravit to an action by a bond creditor of his testator, by shewing that he paid the money over to his co-executor, even for the purpose of satisfying the bond creditor, who had applied for payment to such co-executor, if the co-executor afterwards misapplied the money by retaining it to satisfy his own simple contract debt.

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for the plaintiffs against the defendant *Smith*, damages 1*s.*: and that the defendant *Smith* had assets, ultra the 4*l.* 17*s.*, to the amount of 400*l.* only; subject to the opinion of the Court on the following case.

Grierson the deceased duly executed the bond to *Reeder* deceased at the time it bears date, and paid 100*l.* on it in his lifetime, and died on the 17th of *January* 1795; having made his will, and appointed the defendants executors, who proved the [248] will, *and administered*. The defendant *Smith* lived and still lives at *Southampton*, where *Grierson* lived, and the defendant *Munt* resided in *London*. Early in *February* 1795, *Reeder* wrote to the defendant *Munt*, apprising him of the amount of the bond and of the sums remaining unpaid, and requiring payment thereof. On the 17th of the same *February* the defendant *Smith*, having 400*l.* of *Grierson*'s effects then in his hands, as his executor, remitted that sum to the defendant *Munt* his co-executor, for the purpose of paying this bond of which he had had notice from *Munt*, as appeared by the following letter written by the defendant *Smith* to *Reeder*. "Mr. *Smith*'s compliments to Mr. *Reeder*, and begs to inform him he remitted "Mr. *Munt* 400*l.* to pay his bond on the 17th *February* 1795, "by a draft on Messrs. *Whiteheads*, bankers, in *London*, and that "Mr. *Munt* acknowledged the receipt thereof the 19th ditto. "*Southampton*, 28th *July* 1796." No other evidence was given of the defendant *Smith*'s knowing of the bond or the terms of the condition. At the time of the remittance *Munt* was in good credit, and *Smith* knew that he was a simple contract creditor of *Grierson* to a larger amount than 400*l.* *Munt* applied the 400*l.* towards the payment of the simple contract debt due from *Grierson* to him; though he knew of this bond, and had received the 400*l.* from *Smith* to pay it. *Munt* became bankrupt on the 4th of *July* 1796, as stated in the pleadings. *Reeder* died in *October* 1797, intestate, leaving the plaintiff administratrix his only daughter, who took out administration to him. On the 21st of *November* 1798, the plaintiff administratrix proved the money then due for principal and interest on the bond, being 468*l.* 15*s.*, as a debt under *Munt*'s [249] commission, whereon a dividend has been declared, of which she had notice, as stated in the pleadings. *Munt* has obtained his certificate. *Munt* had no assets of *Grierson* in his hands at the

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the time he became a bankrupt on which the plaintiff administratrix could found the proof of a debt against him, as having committed a devastavit to the amount so proved, without including the money he had so received from *Smith*. She knew the 400*l*. had been remitted by *Smith* to him for the purpose of paying the bond at the time she proved the debt under the commission. Subsequent to all these proceedings, and before the commencement of the action, the plaintiffs intermarried. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover against the defendant *Smith?* If the Court should be of opinion that they were, then the verdict to stand: if not, then a verdict to be entered for the defendant *Smith*.

Dampier for the plaintiffs. The defendant *Smith* must stand upon the plea of plene administravit: and then the questions will be, 1st, Whether, excluding any idea of *Munt*'s bankruptcy, this be an administration by *Smith?* 2dly, Whether this demand be barred by *Munt*'s certificate, or on the ground of the plaintiff administratrix having adopted *Smith*'s payment to *Munt?* 1st, In *Churchill* v. *Hobson*, (*a*) in Equity, the distinction was taken that where two trustees join in a receipt, and only one receives the money, the other is not liable: but where two executors join in an acquittance, and one only receives the money, both are chargeable for it as to *creditors*, who are to have the utmost benefit of the law; but only the actual receiver is liable to *legatees* or persons claiming under distribution who have no remedy but in equity: for the substantial part is the receiving the money which alone is regarded [250] in equity. There indeed the plaintiff who had paid money into the hands of his co-executor, who afterwards became bankrupt, was relieved; but Lord Chancellor *Harcourt* relied principally on the circumstance that such co-executor had been the testator's banker, and intrusted by him with the custody of his money in his life-time. Now here the plaintiff is a *creditor*, and the defendant is an *executor*, and not merely a *trustee*, and the money was at one time in the hands of the defendant. And this is the case of a devastavit by the co-executor, and not merely that of a failure. It is no objection that the bond was not due at the time; for it was payable notwithstanding before

(*a*) 1 *Salk.* 318, and 1 *P. Wms.* 241.

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a simple contract debt. (*a*) Neither is there any clause in this will, that one executor shall not be answerable for the default of another, which was relied on by Lord *Northington* in *Westley* v. *Clarke;* (*b*) and there the money was never in the power of the co-executor. The principle however of all the cases (with one exception) is, that where by the act or agreement of one executor the testator's effects come to the hand of a co-executor, the former shall be answerable for his companion, the same as if he had enabled a stranger to receive them. This was laid down in *Gill* v. *The Attorney General,* (*c*) and confirmed in *Sadler* v. *Hobbs (d)* by Lord *Thurlow,* who examined all the cases, and disapproved of the exception made by Lord *Northington* in *Westley* v. *Clarke.* All the cases were again revised by Lord *Alvanley,* when Master of the Rolls, in *Scurfield* v. *Howes;* (*e*)

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who, though he thought that an executor merely joining his co-executor in a receipt was not in all cases conclusive in equity, yet admitted that he was liable where he had actually received the money, and entrusted it to the other who failed. The only case which leans the other way is *Balchen* v. *Scott,* (*f*) where an executor who had proved the will, but did not act, having received a bill of exchange by the post from a debtor to the estate, which he immediately sent to the acting executor, was holden by Lord *Loughborough* C. J. not to be chargeable. But that was in the case of a residuary legatee, and therefore falls within the distinction in *Churchill* v. *Hobson.* And the executor sought to be charged never acted; but here the defendant acted as well as *Munt;* for it is stated that *they administered.* Besides, that case was very little discussed. In *Bacon* v. *Bacon,* (*g*) one executor living in *London* had paid money to his co-executor living in the country, where the testator had also resided, in order to pay debts contracted in the neighbourhood, which were likely to be best known to such co-executor who had been the confidential agent and attorney of the testator; under which circumstances the Lord Chancellor held him not liable: but there was also an express clause in the will that neither of the executors should be liable for the act, receipt, or

(*a*) *Lomax* v. *Ecoke,* 3 *Ler.* 57.
(*b*) Cited in a note to *Fellows* v. *Mitchell,* 1 P. Wms. 83. by Mr. Cox.
(*c*) *Hardr.* 314. (*d*) 2 *Bro. Chan. Rep.* 116.
(*e*) 3 *Bro. Chan. Rep.* 90.
(*f*) 2 *Ves. jun.* 393. (*g*) 5 *Ves. jun.* 331.

default

default of the other; which was relied on in *Westley* v. *Clarke*. And none of those excepted cases were so strong as this, where the money was at one time in *Smith*'s hands, who had taken upon him to administer, and who trusted it to *Munt*, knowing that he was a simple contract creditor, and that if the estate were not solvent he was interested in making away with it. Then supposing *Smith*'s handing over the money to *Munt* not [252] to discharge him on the plea of plene administravit, the second question is, Whether *Munt*'s certificate can be a bar to this action against *Smith?* Executors have a joint and entire interest in all the goods of the testator, and any suit against them must be joint, otherwise they may plead in abatement. But though the demand be primâ facia joint, one executor may discharge himself by shewing an administration by him, or other legal discharge. Now *Munt*'s bankruptcy and certificate are only a discharge of himself; for by stat. 10 *Ann. c.* 15. *s.* 3. it is provided, that no person who stands jointly bound with the bankrupt shall be thereby discharged. And as the assets came into *Munt*'s hands by *Smith*'s assent, the receipt in that case is joint, according to the doctrine in *Gill* v. *The Attorney General.* (*a*) The objection, that the plaintiff has discharged *Smith* by resorting to *Munt*'s estate, supposes their separate remedies to be inconsistent: but that is not so; for whatever is obtained by the plaintiff under *Munt*'s commission is so much in aid of *Smith.* As in case of a bill of exchange, the indorsee may pursue his remedy against all whose names are on the bill, so that upon the whole he does not recover more than the amount of the bill. So these are concurrent remedies.

Marryat contrà. The stat. 10 *Ann.* only extends to *joint contractors*, which does not apply to executors. The case *Ex parte Llewellyn* (*b*) shews that a debt of this sort, contracted by an executor who has wasted the goods of his testator, is proveable under the executor's commission; and, being so, is discharged by his certificate. And the exercise of the option of [253] so proving the debt by the plaintiff administratrix under *Munt*'s commission operates to preclude any remedy which *Smith* might otherwise have had against *Munt*, however it may exonerate *Smith* as to so much of the debt as may be recovered under *Munt*'s commission. The principal question, however, is

(*a*) *Hardr.* 314. (*b*) *Co. Bank. L.* 163. 3d edit.

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how far payment by one co-executor to another of part of the assets of their testator, with a view to a regular course of administration, and in consequence of the application of the bond creditor to such other co-executor for payment, can be considered as a devastavit? The payment to the co-executor was induced by the application of the creditor himself to such co-executor, from whom it was more convenient to him to receive it. It would be injurious to creditors in general if each executor were obliged to pay to the respective creditors their proportions of the assets collected by himself: additional delay and expence would be induced. There is no authority in a court of law for making such a bona fide transfer of the assets from one co-executor to another a devastavit; and the later decisions in equity are against it, which have much relaxed the ancient strict rule binding executors for each other's acts. Joining in a written receipt for assets was formerly holden to make a co-executor liable, though he did not in fact receive the money; but now it seems that whatever he does bonâ fide in laying out, or remitting money, or lodging it with a banker whose solvency is not questionable at the time, it will discharge an executor; and that he shall only be answerable for breach of trust or palpable negligence in administering the effects. The opinion in *Gill* v. *The Attorney-General* (*a*) was an obiter
[254] dictum. Lord *Northington*, in *Westley* v. *Clarke*, (*b*) first exonerated an executor who had merely joined in giving a receipt for liability to answer for the application of the money by his co-executor who had in fact received it. And in *Churchill* v. *Hobson*, (*c*) even while the strict rule prevailed, Lord *Harcourt* held that it did not bind an innocent co-executor as against legatees: and he there held that an executor was entitled to his discharge who had lodged assets received by him in the hands of the same banker who had been employed by his testator, though he afterwards failed. And in *Sadler* v. *Hobbs*, (*d*) the executor who was holden liable for the misapplication of the assets by another had conducted himself very improperly: he had joined with his co-executor in drawing the money out of a solvent house and putting it into the hands of another house in which the co-executor was a partner, where it was

(*a*) *Hard.* 311.
(*c*) 1 *P. Wms.* 241.
(*b*) 1 *P. Wms.* 83. *n*
(*d*) 2 *Bro. Chan. Cas.* 114.

suffered

suffered to remain for several years, till they became insolvent: and soon after such transfer the first executor received from the house of his co-executor a large sum in which they were indebted to him before; from whence an undue motive for the transfer might be inferred. So in *Scurfield* v. *Howes*, (*a*) where the party acted more as trustee than as executor, there was also a direct violation of the trusts of the will. The mortgage-money, when paid off was directed to be laid out in government securities, and the co-executor and trustee who joined in the receipt and re-conveyance suffered the money to remain in other hands. Since the opinion of Lord *Thurlow* in *Sadler* v. *Hobbs*, it has been decided in the two cases of *Balchen* v. *Scott*, (*b*) and *Bacon* v. *Bacon*, (*c*) that the mere putting of assets into the hands of an executor will not make him liable for the subsequent misapplication of his co-executor. In the first [255] of these the one executor actually received a bill by the post, which he immediately transmitted to the acting executor. In the other case the one executor had transmitted the money to his co-executor in the country, who had been a confidential agent of the testator, for the purpose of paying the testator's debts there; which was deemed sufficient for his discharge. The ground of the decision was, that the payment was made in the usual course of business, and no blame or negligence was imputable to the solvent executor. And the same rule prevails in the case of a receiver appointed by the Court of Chancery. (*d*) It is agreed that if goods be impaired in the hands of an executor without his default he is not liable. (*e*) [Lord *Ellenborough* asked what would be the case if an executor were robbed?] An executor is not liable more than a common bailee; and he would certainly not be liable in case of a robbery.

Dampier, in reply, said, that a joint obligation arose out of the joint receipt of the executors, and therefore the case came within the stat. 10 *Ann.*: and that the plaintiffs having proved the debt under *Munt*'s commission could not prejudice *Smith*, though it might favour him: for if as between the two executors *Smith*'s demand against *Munt* existed before the act of bankruptcy he might have proved it under the commission: if

(*a*) 3 *Bro. Chan. Rep.* 90. (*b*) 2 *Ves. jun.* 678.
(*c*) 5 *Ves. jun.* 331. (*d*) 3 *Atk.* 130. *Knight* v. *Ld. Plymouth.*
(*e*) 6 *Mod.* 131.

afterwards

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afterwards, the certificate was no bar. That the inconvenience of executors paying the money of the testator into each other's hands would be much greater to creditors in general than making each executor personally accountable for what he actually received proportionably to each creditor. And that upon a review of all the cases the general rule appeared to be that an executor
[256] was liable to account for what he actually received, unless he could excuse himself by special circumstances, such as had been admitted, though not without question, in some of the cases: but at any rate that those equitable circumstances if they existed at all, however they might operate to induce a court of equity to give an executor his discharge, could be no defence at law, where the fact of the receipt of assets by an executor was conclusive against him, unless he could shew a due administration of them under the plea of plene administravit.

Lord ELLENBOROUGH C. J. said, it was a case of the first impression in a court of law, and very fit to be maturely considered. The case therefore stood over till this term, when his Lordship delivered the judgment of the court.

After stating the record and the case; the only material question in this case is, whether *Smith* the defendant, having once as executor of *Grierson* deceased had 400*l.* of *Grierson* in his hands, liable to the payment of *Reeder*'s bond debt to the plaintiff, for which this action is brought, and capable of being so applied, is discharged in point of law, by having paid that money over to his co-executor *Munt*, for the purpose of being applied by such co-executor in payment of this bond; but who was afterwards guilty of a devastavit in respect thereto? Another point was made in argument as to the effect of the partial satisfaction which the plaintiff's wife *Eliza Lawrence Crosse* obtained against the defendant *Munt*, by a proof and dividend under his commission upon the same sum of money. But as that can unquestionably operate in point of law no further than as an extinction of the plaintiff's debt pro tanto, i. e. to the amount of the dividend received from the other executor *Munt*, who was
[257] jointly liable with defendant *Smith* for the entire sum, and not as a bar to this action as against *Smith*, it is unnecessary to occupy further time in the consideration of so clear a proposition.

It has heretofore in many cases been made a question, where by the act or agreement of one executor money gets into the hand

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hands of his companion the other executor, whether both shall be answerable? In *Sadler* v. *Hobbs*, 2 *Bro.* 116. Lord *Thurlow*, founding himself upon the case before Lord *Hale*, then Ch. Baron, in *Hardres* 114. *Gill* v. *The Attorney-General*, was of opinion, that if one executor put money into the hands of his companion, he shews that he had it in his power to secure it, and that his companion, for some reason was permitted to obtain possession of the money. In *Westley* v. *Clarke* (in Mr. *Cox's* notes on *Fellows* v. *Mitchell and Owen*, 1 *P. Wms.* 83.) Lord *Northington* had held a doctrine more favourable to executors: he laid the main stress on *the act of receiving the money*. He says, "The material part of this transaction is *the receiving* "*of the money* which was by one *Thompson* only: the other sign- "ing the receipt is only form. I am therefore of opinion and de- "clare, that the defendants *Clarke* and *Betts* (the other execu- "tors) are not liable to make good the sum of 600*l.* (the sum "not accounted for by *Thompson* the bankrupt executor) *no part* "*of which came to their hands;* the same having been received "by *Thompson* the bankrupt." It appears therefore from this, that the ground upon which alone the other executors were holden exempt from a responsibility for this sum, was the fact of their having received no part of it. And that if the money had come to their hands also, Lord *Northington* would have holden them equally liable with the other executor for what [258] they had received. And Lord *Alvanley*, when master of the Rolls, in the case of *Hovey* v. *Blakeman*, 4 *Ves. jun.* 608. says that he perfectly concurs in *Westley* v. *Clarke*, the above-mentioned case before Lord *Northington*. And the doubt almost in every case seems to have been, whether an executor joining in a receipt, or doing some other necessary act to enable his companion to receive, be chargeable as if he had himself received; there never being any question made what would have been the effect of his own personal receipt and possession of the assets. It never has been made a doubt in any case at law, that if money has, in the language of the plea, "*come to the executor's hands to be administered*," that it must also have been in fact applied by him in a due course of administration in order to his discharge. And it never has been thrown out in any case that I can find before that of *Bacon* v. *Bacon*, 5 *Ves. jun.* 33. (which however was not the case of a creditor plaintiff,) that it is sufficient

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cient "if the business were transacted in the ordinary manner, unless there were some circumstance to awaken suspicion." It would indeed follow from that doctrine, that an executor was to be considered, as the defendant's counsel ventured to contend he should be, i. e. as a mere ordinary bailee; an idea probably then for the first time suggested in a court of law. As no case at law has yet decided, that an executor once become fully responsible by actual receipt of a part of his testator's property, for the due administration thereof can found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, as destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means
[259] which afford excuse to ordinary agents and bailees in cases of loss without any negligence on their part; I say, as no such case in respect to executors has yet occurred in a court of law, we are not from the particular hardship of the present case, authorised to make such a precedent in favour of this defendant. In conformity therefore to the rules of law as handed down to us in respect to executors, we are obliged to pronounce that the defendant *Smith*, having once received and fully had under his controul assets of the testator applicable to the payment of this bond debt, was responsible for the application thereof to that purpose; and such application having been disappointed by the misconduct of his co-executor whom he employed to make the payment in question, he is liable for the consequences of such misconduct as much as if the misapplication had been made by any other agent of a less accredited and inferior description: and that therefore the verdict, which has in this case been found against the defendant *Smith* must stand.

Judgment for the Plaintiff.

ROE

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ROE, on the demise of E. CHILD, and MARY his Wife, *against* WRIGHT.

Tuesday, Feb. 11th.

IN ejectment, for certain houses and premises called *the Coal Yard*, in the parish of *St. Giles*, in the county of *Middlesex*, which was tried before Lord *Ellenborough* C. J. at *Westminster* after last *Michaelmas* term, a verdict was entered for the Plaintiff, subject to the opinion of the Court on the following case.

The word *estate* will carry a fee in a will, if not restrained by other words; and held that it was not restrained in a devise of "all "my estate, "lands, &c. "known and "called by "the name of "the *Coal* "*Yard* in "the parish "of *St. Giles*, "*London*."

**James Camper* being seised in fee of the premises in question, and also seised and possessed of other freehold, copyhold, and leasehold estates in *Essex*, *Middlesex*, and *Huntingdonshire*, by his will duly executed, dated 28th of *January*, 1763, devised as follows. "As touching such worldly and personal estate "wherewith it hath pleased God to bless me, I give, devise and "dispose of the same in the following manner. Imprimis, I give "and devise unto my loving wife *Sarah Camper* all my lands, "houses, &c. freehold, copyhold, and leasehold, whatsoever *[260] "and wheresoever, and to receive the rents and profits thereof "during her natural life, and also all my deeds, mortgages, "bonds, and writings, and also all my stock, goods, chattles, "effects, and personal estate whatsoever and wheresoever; she "paying thereout the legacies hereinafter given and disposed of. "And I do hereby appoint my said wife sole executrix of this "my will. And after her natural life, I do hereby order, direct, "give, devise, and bequeath all my lands, houses, &c. free-"hold, copyhold, and leasehold, in manner following: I give "and devise unto my grandson *James Wright* all my lands, "freehold, copyhold, and leasehold, in the county of *Essex*, "(except herein excepted and reserved the house I now live in, "with all the lands, yards, out-houses, stables, and all other "conveniences and appurtenances thereunto belonging and to "be hereinafter disposed of.) Also I give and devise unto "my grandson *James Wright* all my estate, freehold and copy-"hold, lying and being in the town of *Ellington* in *Hunting-"donshire*. And also I give, devise, and bequeath unto my "grandson *John Wright all my estate, lands, &c. known and called "by the name of the* Coal Yard, in *the parish of* Saint Giles, "London. Also I give unto my grandson *John Wright* 500*l.* "to be paid in six months after my decease. Also I give and [261]

"devise

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ROE d. CHILD, *against* WRIGHT.

" devise unto my grandson *James Camper* the house I now live " in, with all the lands, yards, out-houses, and all the appur- " tenances belonging to the same, and also all my houses and " lands, commonly called and known by the name of *Castle* " *Yard*, in *Holborn*, *London*, and now in the tenure or occupa- " tion of *George Oldmixon*, Esq. Also I give and devise unto " my grandson *James Camper* 500*l*., to be paid when he shall " attain his age of 21 years." The testator died on the 30th of *January* 1763, leaving *Sarah Camper* his widow, and his three grandsons, *James Wright*, *John Wright*, and *James Camper*, named in his will him surviving; which *James Camper* was also his heir at law. Upon the death of the testatator *Sarah Camper* the widow entered into and continued in possession of the premises, together with the other property devised to her during her life. Upon her death *John Wright* entered into possession of the said houses and premises, called *the Coal Yard, in the parish of* Saint Giles, Middlesex, and continued possessed until *May* 1805, when he died; leaving the defendant *James Camper Wright*, his heir at law; who on the death of *John Wright* took possession of the premises, and held them at the time of the demise and ejectment. *Jame Camper*, the testator's grandson and heir at law died in 1768, intestate as to the premises in question; leaving *Mary* the wife of *E. Child* (one of the lessors of the plaintiff) his only child and heir at law, and also the heir at law of the testator. The question for the opinion of the Court was, whether the lessors of the plaintiff were entitled to recover? If they were, the verdict was to stand; if not a nonsuit was to be entered.

[262] *Marryat*, for the lessors of the plaintiff, contended that by the devise to the testator's grandson *John Wright* of " *all* his *estate*, lands, &c. known and called by the name of *the Coal Yard*, in the parish of *St. Giles, London*," the fee did not pass, but only a life estate. There are indeed introductory words, *as touching* the devisor's *worldly and personal estate*: but they are satisfied by his having given a life estate in all his property to his widow: after which follow fresh words of introduction, " and *after her natural life*," &c., which do not indicate an intention to pass the fee to the devisees in remainder; and there are no words of limitation annexed to the devise in question. The only question then is, Whether the word *estate*, coupled as it is with other explanatory words, be sufficient to carry the fee? The devisor by the introductory

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introductory words devises "all his *lands*, &c. *in manner following;*" what follows then is merely an indication of the several persons amongst whom the *lands* were to be distributed; and though words of amplification may be used, they still refer to the *things* themselves which he had so expressed his intention to dispose of, and not to the quantum of interest which he had in the several properties. He explains what he means by the word *estate* by the words *lands*, &c.: and still further to shew that he only intended the word *estate* as a local description of the thing, he adds, "known and called by the name of the *Coal Yard*," &c. In the former case of *Doe* v. *Wright*, (*a*) on another clause of the will devising the estate in *Essex* to *James Wright*, only an estate for life was holden to pass; and though the word *estate* does not occur in that devise, and the force of that word in general to pass a fee was acknowledged; yet from [263] the insertion of it in one clause and the omission of it in another coupled with it, devising two estates to the same person, without any apparent intention to convey a greater interest in the one estate than in the other, and still further when coupled with (*b*) and explained by the word *lands*, which is also used in the second introductory words, it is apparent that the devisor did not use the word *estate* in its largest legal signification, but in its ordinary local one. If the devisor had given *all his estate in the Coal Yard*, that would have shewn that he meant to convey all his interest in the estate. In *Tuffnell* v. *Page* (*c*) a devise of "*my estate* AT KIRBY HALL" was indeed decreed to carry a fee; but there were preliminary words denoting the devisor's intention to settle *all the estate which he had:* and there the word *estate* stood alone and not explained by the local word *lands;*

(*a*) 3 *Term Rep.* 61, and *vide* S. C. *Doe d. Wright* v. *Child*, 1 *New. Rep.* 335.

(*b*) *Hogan* v. *Jackson*, *Cowp.* 306.

(*c*) 2 *Atk.* 37. The distinction was also alluded to, which had been once taken, between the words my estate *in A.* and my estate *at A.*; but the opinion of Ld. *Talbot* in *Ibbetson* v. *Beckwith*, *Cas. temp. Talb.* 157., and that of Ld. *Hardwicke* in *Goodwyn* v. *Goodwyn*, 1 *Ves.* 228., were said in answer to have gotten rid of that subtlety. And it was observed that in the latter case the addition of the words "*in the occupation* of such a tenant," was not considered by Lord *Hardwicke* as restraining the general legal effect of the word *estate*, and *Williams* Serjt.

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lands; and so it did in *Holdfast* v. *Marten,* (*a*) where, however, the Court relied much on the use of the same word in the residuary clause to convey the fee. Then if the operating words of the devise, taken altogether, are not in themselves sufficient to carry the fee, the first introductory words, supposing them to override the whole will, cannot have that effect; as in *Doe* d. *Small* v. *Allen,* (*b*) where a devise of "all my *messuages, lands,*" &c. in *S.* to *A.* were holden to carry only a life estate, though preceded by introductory words, "as to what real and personal *estate* it has pleased God to bless me with."

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Williams Serjt., contrà, contended that the word *estate* in itself carries a fee, and according to what was said by *Holt* C. J. in *Countess of Bridgwater* v. *Duke of Bolton,* (*c*) and by *Buller* J. in *Holdfast* v. *Marten,* (*d*) requires words of restraint to make it carry a less estate; and that here neither the words "*lands,*" &c. nor the designation of the estate; *by the name of* the Coal Yard did so restrain it; but that it stood as a devise of "*all* my ESTATE *in the parish of St. Giles,*" &c. which according to all the authorities was a designation not only of the *thing,* but of the devisor's *interest* in it; as in *Wilson* v. *Robinson,* (*e*) where the devise was of "*all* my tenantright *estate* at *B.*," &c.; and in *Barry* v. *Edgeworth,* (*f*) where a devise of all my *land* and *estate* in *Upper Catesby* to *W. E.* was deemed to carry the fee; for otherwise, as was said, the word *estate* would have no effect, as the word *lands* was enough to carry the estate for life. In *Bailis* v. *Gale* (*g*) the devise was of "all that *estate* I bought of *Mead;*" in *Ibbetson* v. *Beckwith* (*h*) it was of "all my estate at *N.* (and *in N.* was said to be the same as *at N.;*) in *Tuffnell* v. *Page* (*i*) it was of "my estate *in Kirby Hall* to *A. S.* and after his death to *W. T.* my estate *at Kirby Hall;*" and in *Tanner* v. *Wise,* (*k*)

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noticed that the supposition of the contrary by Lord *Kenyon* in *Fletcher* v. *Smiton,* 2 *Term Rep.* 659. referring to the case in *Vesey* was a mistake.

(*a*) 1 *Term Rep.* 411. (*b*) 3 *Term Rep.* 497.
(*c*) 6 *Mod.* 106. and 1 *Salk.* 236.
(*d*) 1 *Term Rep.* 411. and vide *Doe* v. *Burnsall,* 6 *Term Rep.* 34.
(*e*) 2 *Lev.* 91. and 1 *Mod.* 100. (*f*) 2 *P. Wms.* 523.
(*g*) 1 *Ves.* 48. (*h*) *Cas. in Eq. temp. Talb.* 157.
(*i*) 3 *Atk.* 37. (*k*) 3 *P. Wms.* 294.

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it was of "all the rest of my *estate*," &c.: and in all these cases the fee was holden to pass. Lastly * he referred to *Cole* v. *Rowlinson*, (*a*) where the devise was of "all my *estate*, right, "title, and interest, &c. in whatever I hold by lease from *J. F.*, "*and also the house called the* Bell Tavern, to *J. B.*" and three Judges (against one) read the will as if it had been "I give *all* my *estate*, &c. *in* the house *called the* Bell Tavern to *J. B.*," and held that *J. B.* took a fee in the *Bell Tavern*. And he added, that when the devisor meant to give only a life estate, as in the prior devise to his wife, he had expressly said so.

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Marryat, in reply, said, that none of the cases cited, where the word *estate* was holden to carry the fee, were there any words of restraint and locality coupled with it, such as the words *land called*, &c., except in *Barry* v. *Edgeworth*: and there the word *land* preceded the word *estate*, which shewed an intention to give the whole interest in addition to the land itself. And in *Cole* v. *Rowlinson* there were even words of amplification, such as *right, title, and interest*, in addition to the word *estate*. After time taken by the Court to look into the authorities cited,

Lord ELLENBOROUGH C. J. now delivered judgment. The question is, Whether under these words in a will, "I give, devise, and bequeath unto my grandson *John Wright all my estate, lands, &c. known and called by the name of* the Coal Yard, *in the parish* of Saint Giles, London," the devisee took an estate in fee, or for life? The lessors of the plaintiff, of whom *Mary* is heir at law of the testator, contend that the devisee took only an estate for life: the defendant, who is heir at law of the devisee *John Wright*, contends that he took an estate in fee. It is admitted by the counsel for the lessors of the plaintiff, that the words *all my estate*, in a will, in general comprehend not only the *thing*, or subject-matter of the devise, but the *interest* in it, and give a fee to the devisee, unless the effect of these words be restrained or qualified by the context. But he contends, that the effect of them is so restrained and qualified in the present instance; and that the words "*lands*, &c. known "and *called by the name of* the Coal Yard, *in the parish of* St. "Giles, London," which immediately follow the word *estate*, are to be understood as merely descriptive of the name and

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(*a*) *Salk.* 234.

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local situation of the thing or subject of the devise, and not of the devisor's *interest* therein: and that the word *estate*, thus accompanied has no other effect than the words "lands freehold and copyhold," in an antecedent part of this same will have already, by a decision of this Court, and also since of the Court of Common Pleas, been allowed to have, in the case of *Doe dem. Child et Ux.* v. *Wright*, 8 *Term Rep.* 64. and in that of *Doe dem. Wright* v. *Child et Ux.*, 1 *New. Rep.* 335. where they were holden to carry a life estate only. The general effect of the words "*all my estate*" in a will, or even where those words are coupled with others limiting them in point of place; as all my estate *in* or *at* a certain specified place, has been so fully settled by most of the various cases cited for the defendant, as carrying a fee; viz. by *Wilson* v. *Robinson*, before Lord *Hale*, in 2 *Lev.* 91. and 1 *Mod.* 100. *Countess of Bridgewater* v. *The Duke of Bolton*, 6 *Mod.* 106. and *Salk.* 236. before Lord *Holt;* by *Barry* v. *Edgeworth*, 2 *P. Wms.* 524. *Ibbetson* v. *Beckworth*, *Talbot* 157. *Tuffnell* v. *Page* 2 *Atk.* 37. *Goodwyn* v. *Goodwyn*, 1 *Vesey*, 228; and lastly, in the case of *Holdfast* v. *Marten*, 1 *Term Rep.* 411. (and which last case, with the exception of the residuary clause in that case, is nearly

[267] in terms with the present;) that it is unnecessary to add any observations upon them to those which have been made at the bar. Considering therefore the words "all my estate," in the language of Mr. Just. *Buller* in *Holdfast* v. *Marten*, as the most general and effectual words that can be used to pass a fee; "and that so far from its being necessary to add words of inheritance, in order to make it pass a fee, words of restraint must be added in order to carry a less estate;" this question will then turn solely upon the supposed words of restraint in the present instance. And I cannot but consider the words "*lands*," &c.; which follow the word *estate*, as descriptive only of the subject-matter in which the general interest predicated before by the word *estate*, consisted; and as tantamount to "all my estate *in lands*," &c.; or, to "all my estate *in lands, houses, or whatever else it may be:*" and between the words "all my *estate, lands*," &c. in this case, and the words "all my *land and estate*," in the case of *Barry* v. *Edgeworth*, there seems to be no material difference in point of reason and effect, so as to require a different construction. The vice of the plaintiff's construction is, that *estate* and *lands*, &c. must be made to mean the same thing

thing as *lands* only, in order to defeat the effect of the word *estate:* whereas, according to the defendant's construction, each word will have its proper signification: namely, the word *estate* as expressive of the entire interest; *lands* as expressive of the particular subject-matter or particular kind and quality of the thing in which such entire interest subsists. Supposing therefore that the proper and natural effect of the word "*estate*" is not restrained by the words "*lands,*" &c. which immediately follow it, the only remaining question will be, whether it be so restrained by the words "*called or known by the name of* the Coal Yard, *in the parish of* St. Giles?" But if those words be applied to the word *estate* standing in its general and unrestricted sense, they will collectively amount to no more than this; viz. "all my estate in the lands, &c. in *St. Giles's* parish, called *the Coal Yard.*" And this is not going much further than was done by Lord *Hardwicke* in respect of similar words of locality in *Tuffnell* v. *Page*, 2 *Atk.* 37.; which words were, "*my estate in* Kirby Hall, *near* Hennington Castle, *by* Henningham *town;*" upon which Lord *Hardwicke* observed, "that the word *estate* "was sufficient to pass not only the land, but all the interest "the testator had in it besides: for though here is a locality in "*Kirby Hall*, yet the testator meant his interest in it too." But supposing that in this last case the locality is to be referred solely to *Kirby Hall;* yet in *Goodwyn* v. *Goodwyn*, 1 *Ves.* 228. Lord Hardwicke said, that a devise of "all the testator's estates in *A.*" would carry a fee; "and that there was no reason why the words" in the occupation of *B.* and *D.* "should restrain it "more *than the locality, which would not.*" And in this sense, giving a proper effect to each word in the sentence, it appears to us that these words may be understood; and thereby the actual intent of the testator be effectuated, who probably meant in this case, as testators usually do, to give the entire interest in the subject of the devise, where no words are used which expressly denote an intention to give a less interest therein.

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Judgment for the Defendant.

DOE

1806.

Tuesday, Feb. 11th.

DOE, on the several Demises of EVERETT and Others, *against* COOKE and Others.

One devised a leasehold for a long term after the decease, &c. of *S. K.* to *T. C.* for life, remainder to his child or children by any woman whom he should marry, and his or their executors, &c. for ever, upon condition that *in case the said* T. C. *shall die an infant, unmarried, and without issue*, the premises to go over to his father *W. C.* and his three other children share and share alike, and their heirs, executors, &c. Held that the devise over depended upon *one contingency*, viz. T. C.'s *dying an infant*, attended with *two qualifications*, viz. his dying *without having a wife surviving him*, or dying *childless*; and that the devise over could only take effect in case *T. C.* died in his minority leaving neither wife nor child: and here it failed, *T. C.* having attained 21, and married before his death. Though the devise of a term to one for life, with a contingent remainder over, will in general only entitle the first taker to a life estate if the remainder over do not take effect, and the residue of the term will go to the personal representative of the testator; yet the testator's intent appearing to be to dispose of the whole from his executors, held that the lessors of the plaintiff who claimed under his will, were entitled to recover after the death of *T. C.* without issue.

IN ejectment for lands in the parish of *Butleigh* in the county of *Somerset*, on the several demises of *William Everett*, *Mary Mears*, and *Jane Cooke*, all laid on the 10th of *April* 1805, which was tried before *Graham* B. at the last assizes at *Bridgewater*, a verdict was found for the Plaintiff, subject to the opinion of the Court on the following case.

Thomas Browning, being possessed of a leasehold interest in the premises in question for a long term of years still unexpired, by his will, dated the 17th of *January* 1760, devised the premises as follows: "Also I give, devise, and bequeath, the use and occupation of a dwelling-house and out-houses lying in *Butleigh*, &c. with a close, &c. adjoining, called *Kelways*, with the rents, issue, and profits thereof, to *Thomas Cooke*, son of *William Cooke*, of *Butleigh*, husbandman, by *Elizabeth* his late wife, deceased, to hold to him the said *Thomas Cooke* and his assigns from and immediately after the death of *Susannah Kelway*, widow, or the day of her marriage again to any other husband, which shall first happen, for and during the term of his natural life: and after his decease, I give and devise the same to the child or children of the said *Thomas Cooke*, to be begotten by him on the body of any * woman or women that he shall hereafter intermarry with, his, her, and their executors, administrators, and assigns, for ever. But my will is upon this further condition, that *in case the said* Thomas Cooke *shall die an infant, unmarried, and without issue*, then I do hereby give and devise the said dwelling-house, out-houses, and close, &c. unto the said *William Cooke*, and his three other children by the said *Elizabeth Cooke* his late wife, deceased, share and share alike, as tenants in common, and not as joint-tenants, his, her, and their heirs, executors, administrators, and assigns, for ever." *Thomas Brown-*

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1806.

DOE ex dem. EVERETT *against* COOKE.

ing died shortly afterwards. *Susannah Kelway*, mentioned in the will, died soon after the testator. *Thomas Cooke* entered on the premises in question, and afterwards married *Jane Benjafield*, one of the lessors of the plaintiff, held the premises to his death, and died in *February* 1802; never having had any issue, and being about 46 years old. *William Cooke*, named in the will, the father of *Thomas* and of the defendants *John Cooke* and *Rebecca Coombs*, died on the 10th of *March* 1764. *John Cooke* and *Rebecca Coombs*, the Defendants, are two of three children of the said *William Cooke* by *Elizabeth* his then late wife, mentioned in the will, and are in possession of the premises in question; the other was *Mary Callow*, who has been dead some time. The lessors of the plaintiff claim under *Thomas Browning's* will, and are entitled to the premises in question, if the limitation to *William Cooke* and his three children by *Elizabeth Cooke* be void under the facts stated. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover? If so, the verdict was to stand: if not, a nonsuit was to be entered.

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This case was argued by *Pell* for the lessors of the plaintiff, and *Dampier* for the defendants; but as the arguments turned altogether on the intention of the testator, and the most material of them were afterwards noticed by the Court in giving judgment, it is unnecessary to repeat them here. The former referred to *Barker* v. *Suretees*,(*a*) *Price* v. *Hunt*, (*b*) *Framlingham* v. *Brand*,(*c*) *Forth* v. *Chapman*, (*d*) *Porter* v. *Bradley*, (*e*) *Bigge* v. *Bensley*, (*f*) *Beauclerk* v. *Dormer*, (*g*) *Saltern* v. *Saltern*, (*h*) *Target* v. *Gaunt*, (*i*) and *Fairfield* v. *Morgan*, in *Dom. Proc.*, (*k*) and mentioned in reply *Baile* v. *Coleman*, (*l*) and *Doe* v. *Burnfall*. (*m*) The latter cited *Goshawke* v. *Chicgell*, (*n*) and *Woodward* v.

(*a*) 2 *Stra.* 1175. (*b*) *Pollexf.* 615.
(*c*) 3 *Atk.* 390. and 1 *Wils.* 140 (*d*) 1 *P. Wms.* 663.
(*e*) 3 *Term Rep.* 145. It was observed now by *Lawrence* J. that Ld. *Kenyon*, whatever doubts he might have thrown out in this case of the propriety of the distinction originally taken in *Forth* v. *Chapman*, did not deny it to be law: and referred to his lordship's opinion subsequently expressed. Vide *Daintry* v. *Daintry*, 6 *Term Rep.* 344. and *Roe* v. *Jeffery*, 7 *Term Rep.* 589.
(*f*) 1 *Bro. Chan. Rep.* 167. (*g*) 2 *Atk.* 312. (*h*) Ib. 375.
(*i*) 1 *P. Wms.* 432. (*k*) 1805. (*l*) 2 *Term.* 671.
(*m*) 6 *Term Rep.* 30. (*n*) *Cro. Car.* 154. and *W. Jones*, 295.

Glasbrook

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Glasbrook. (*a*) The case stood over for consideration a few days, and

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court. On reading this will, though there may be reason to think that the testator meant, in case *Thomas Cooke* died at any time, without leaving children, that the estate in question should go to *William Cooke* and his three other children; yet we do not think we can put such construction on it; for had the testator's intent been such, nothing would have been more easy
[272] than to have expressed it without any ambiguity: but instead of limiting the estate to go over in that event, the contingency is thus expressed: "My will is, in case the said *Thomas Cooke* shall "die *an infant, unmarried, and without issue*, then I give the "said dwelling-house to *William Cooke* and his three other "children." Now if the Court should confine the estates going over to a *dying without issue*, they must reject the words "*infant, unmarried.*" If they should retain them, and read them as the counsel for the defendant contended they should be read, viz. "if he die an infant, *or* die unmarried, *or* being married, "die without issue," this would be in effect reading the will, as if it had given the estate over on any one of these single events; of course upon the event of his dying without issue; or it would be a mode of reading it not consistent with the supposition that it was the intent of the testator at all events to give over the estate to *William Cooke* and his children, if *Thomas Cooke* should die without issue; because that mode of reading the will would introduce the contingency of his marriage, and defeat the limitation over, though he had no children. And this difficulty will occur, whether you construe the word "unmarried" as meaning without ever having been married, or as meaning not being married at the time of his death. The will certainly cannot be read as if it had been, "If he dies an infant, *or* unmarried, *or* without issue;" for then the condition would be in the disjunctive throughout; in which case the rule is, "Quod in disjunctivis sufficit alteram partem esse veram," and if *Thomas Cooke* had died in his infancy leaving children, the estate would have gone over to *William Cooke* and his children, to the prejudice of those of *Thomas*; which could not have been the intent of the testator. The
[273] most rational construction we can give this will is to construe

(*a*) 2 *Vern.* 338.

it,

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it, as Lord *Hardwicke* did the devise in *Framlingham* v. *Brand*, 3 *Atk.* 390., as *one contingency*; viz. *Thomas Cooke's dying an infant*; attended with *two qualifications*; viz. his dying, without leaving a wife surviving him, or, dying without children. Had he left a wife, and had died an infant, and no children, the testator might have intended, that in such event the widow should be benefited by taking her share under the statute of distributions with the next of kin, or that *Thomas Cooke* should be able to make a testamentary disposition in her favour: meaning also that if he left children, they should have the estate in preference to the wife: and that if he left neither wife or children at his death during his minority, that *William Cooke* and his children should have the estate: but that if he arrived at the age of 21, he should have a power to dispose of it, though he left neither wife or children. In putting this construction on the will the limitation will be read, as if the bequest had been "to *Thomas Cooke* for life, and in case he die an infant unmarried and without issue, then I give the said dwelling-house to *William Cooke* and his children; but if *Thomas* have any children, I give the same after his decease to his children." The contingency upon which the estate was to go over was to consist of three things, the death of *Thomas Cooke* during his infancy, without leaving wife, or child: and as *William Cooke* and his children appear to have been the objects of the testator's bounty next to *Thomas Cooke* and his family, it would be very strange to suppose that the testator introduced into his will contingencies, which might defeat *William Cooke's* interest, without an intention of conferring some advantage on *Thomas Cooke*; and that he meant, if *Thomas Cooke* died an infant, leaving a [274] wife and no children, or should die after he attained the age of 21, that the limitation over should fail, without any advantage whatever resulting to *Thomas Cooke*. And though the disposition of a term to one for life, with a remainder over, will in general entitle the first devisee to no greater interest than an estate for his life, if the remainder should not take effect, and the residue of the term will go to the personal representatives of the testator; yet this rule will not hold, if it appear that the testator's intention was to dispose of the whole from his executors, which we think was the intention of the testator in this case. And it being admitted in the statement of the case that the lessors of the plaintiff are entitled, if the limitation to

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William Cooke and his three children cannot take effect in the events which have happened, we are of opinion that there must be judgment for the plaintiff.

Postea to the Plaintiff.

Tuesday, Feb. 11th.

PAYNE *against* WHALE.

After a warranty of a horse as sound, the vendor in a subsequent conversation said that *if the horse were unsound* (which he denied) *he would take it again and return the money.* This is no abandonment of the original contract, which still remains open; and though the horse be unsound the vendee must sue upon the warranty, and cannot maintain assumpsit for money had and received to recover back the price, after a tender of the horse.

THIS was an action for money had and received, to recover back the price of a horse which had been warranted sound by the Defendant to the Plaintiff. Shortly after the original bargain was made, (of which there was no proof except by the subsequent conversation,) and the money paid, the plaintiff observed that the horse was a roarer and unsound, and tendered back the horse, and demanded his money: the defendant admitted that he had made the warranty, but denied the unsoundness, and * refused to take back the horse or return the money; but told the plaintiff that *if the horse were unsound, he would take it again and return the money.* At the trial after last *Trinity* term at *Guildhall* these facts were proved, and that the horse was a roarer and unsound. But it was objected on the part of the defendant, that the action was misconceived; for that the question to be tried was the unsoundness, which was the subject of the warranty, and could not be tried in this action, the contract not being rescinded, but only in a special action on the case founded on the warranty. Lord *Ellenborough* C. J. however then thought that the special promise to rescind the contract and return the money, if the horse were unsound, took this out of the general rule; and he therefore suffered the plaintiff to recover a verdict for the amount of the price paid. And in *Michaelmas* term last a rule nisi was obtained for setting it aside and having a new trial, upon the authority of *Power* v. *Wells*, (*a*) and *Weston* v. *Downes*, (*b*) which established the principle, that where the contract of warranty is still open, assumpsit for money had and received will not lie by the vendee to recover back the price of the goods warranted; though in the latter case there was a similar promise to take back the horses war-

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(*a*) *Cowp.* 818. (*b*) *Dougl.* 23. See also *Hull* v. *Heightman*, 2 *East*, 145.

ranted.

ranted, if the plaintiff disapproved of them and returned them within a month; which was offered to be done but refused. The case stood over till this term, when

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Garrow and *Marryat* shewed cause against the rule, and referred to *Towers* v. *Barrett*, (*a*) where the contract being that the plaintiff should pay 10 guineas for a horse and chaise, on condition to be returned if his wife should not approve of it, he paying 3*s*. 6*d*. a day for the hire of it; and his wife not having approved of it, the plaintiff returned it in three days, and tendered the hire of it; it was holden, that he might maintain assumpsit for money had and received to recover back the price paid: and yet the wife's dissent was as much to be tried in that case, as the soundness was here. [*Lawrence* J. There the plaintiff had an option by the original contract to rescind it if not approved of by his wife; but here it was no part of the original contract that the horse was to be taken back again and the money returned if it did not turn out to be sound. The defendant only said so afterwards, when it was objected by the plaintiff that the horse was unsound, the contrary of which was insisted upon by the defendant. This distinguishes the two cases.] They then endeavoured to assimilate the cases more, by contending that there was no evidence of the original contract but what was to be collected from the subsequent conversation; and that the whole was to be taken altogether as forming one contract, or as evidence of what had passed between the parties in the first instance. [But *Le Blanc* J. said it was evident that the subsequent conversation amounted only to a recognition by the defendant that he had in the first instance warranted the horse to be sound; which he still insisted was sound: but being pressed by the objection of the plaintiff, he then promised if it were unsound to take it again and return the money.] They then insisted that though the promise were made at a subsequent time, it had reference to the original contract, and was incorporated with it.

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Erskine and *Lawes* in support of the rule. If the defendant were entitled, as it must be admitted that he was, to offer evidence of the soundness of the horse, it is clear that the contract was still open; and then the question could not be tried in this form; but the plaintiff can only sue upon the special contract,

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(*a*) 1 *Term Rep.* 133.

the

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the breach of which he insists upon on the one hand, and the defendant denies on the other. The subsequent promise can make no difference, for it is no more than the law would have implied if the warranty were broken. [Lord *Ellenborough* observed, that strictly speaking the promise was not exactly what the law would say in such a case; for the promise was to take the horse again if unsound, and return the money; but the law would say, that the party failing in his warranty should be answerable in damages. But that it was still open to the defendant to contend that the action should have been on the special undertaking.] In *Towers* v. *Barrett*, by the very terms of the original contract the defendant had no option to refuse taking back the chaise and horse in the event of the wife's disapprobation. But here the defendant insisted, as he had a right to do, on his performance of the original contract, which he never agreed to rescind. Though if the subsequent conversation could be considered as amounting to a new contract, the objection would still remain that it ought to have been declared upon; for it was conditional; (*a*) and the question of soundness was still open to be disputed.

Lord ELLENBOROUGH C. J. then said, that as the cases ran very near to each other, and this would give the rule to many others, the Court would consider of the case before they gave
[278] their opinion; as they wished to proceed upon some sound and clear principle which would not break in upon established cases which had become the habitual law of the land, such as actions of this sort against stakeholders, or for returns of premium. That if the question were upon the warranty, there was no doubt that the action was misconceived: the only doubt was, whether the promise to take back the horse if unsound, and return the money, did not make a difference.

His lordship now shortly delivered the opinion of the Court.—This was a cause tried before me at *Guildhall* to recover back the price of a horse sold as a sound horse, and which proved to be unsound. It was to be collected from the evidence, that there had been a warranty of soundness at the time of the original contract of sale: but in a subsequent conversation, when the plaintiff objected that the horse was unsound, the defendant said, that if the horse were unsound he would take it again,

(*a*) *Hopling* v. *Hastings*, 1 *Salk.* 29.

and

and return the money. And it was contended that the action for money had and received would not lie, upon the authority of *Power* v. *Wells* and *Weston* v. *Downes*, because this was no other than a mode of trying the warranty, which could only be by a special action on the case. It had occurred to me at the trial, that the defendant, by means of his promise to return the money and take back the horse if it were unsound, had placed himself in the situation of a stakeholder, and therefore that on proof that the horse were unsound he was to be considered as holding the money for the use of the plaintiff. But upon further consideration I am clearly satisfied that that promise did not discharge the original warranty, and that the party complaining of the breach of that warranty must still sue upon it. The second conversation is not to be considered as an abandonment of the original warranty, the performance of which the defendant still insisted upon; but rather as a declaration that [279] if the warranty were shewn to be broken, he would do that, which is usually done in such cases, take back the horse and repay the money. Then where any question on the warranty remains to be discussed, it ought to be so in a shape to give the other party notice of it, namely, in an action upon the warranty.

Nonsuit to be entered.

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Tuesday, Feb. 11th.

ROE on the Demise of CHARLES PRIDEAUX BRUNE, Clerk, *against* RAWLINGS.

Where *A.*, tenant for life, with a limited power of leasing, reserving the ancient rent, received a letter from a confidential agent in 1728, containing a minute account of the tenants and rents of the estate, which letter the tenant for life indorsed "*A particular of my estate*," &c. and handed down to *B.*, the succeeding tenant for life, who had a like limited power of leasing, by whom it was also preserved and handed down amongst the muniments of the estate to the first tenant in tail: held that such paper was evidence for the tenant in tail against a lessee of *B.*, in order to shew that the rent reserved by *B.*, the tenant for life, was less than the *ancient* rent which was reserved at the time to which such paper referred; the paper having been accredited by the then owner of the estate, who had the means of knowing the fact, and who had an interest the other way, viz. to diminish the rent in order to increase his fine upon renewal under the power. And held also that entries by *A.*, the tenant for life, in his book of the receipt of the rent to the amount stated, were also evidence of the same fact.

IN ejectment for certain lands in the parish of *Padstow*, in *Cornwall*, the lessor of the Plaintiff produced a deed of settlement of 1728, whereby the lands in question, among others, were settled on *Edmund Prideaux* the elder for life, remainder to *Edmund Prideaux*, the younger, for life, remainder to *Humphrey Prideaux*, eldest son of *E. Prideaux* the younger for life, remainder to his *first* and other sons in tail male; and the lessor of the plaintiff was the first tenant in tail under that settlement. *E. Prideaux* the elder died soon after the settlement made in 1728. *E. Prideaux* the younger succeeded him, and died in 1745, when *Humphrey Prideaux* came into possession, and continued so till his death in 1793, whose eldest son, the lessor of the plaintiff, then came into possession. The * settlement contained a leasing power, whereby any tenant for life was enabled "from time to time, by indenture under his hand and seal, to make grants, leases, or demises, of or for all or any part or parts of the demesne lands, whereof he should be in the actual possession, for any term of years not exceeding 21 years, *or for the life or lives* of any one, two, or three person or persons, *so as no greater estate* than for three lives be at any one time in being in any part of the premises, *and so as the ancient yearly rent* or a proportionable part thereof be reserved." The Defendant claimed under a lease of the premises for 99 years determinable on three lives (still extant,) granted in 1778 by *Humphrey Prideaux*, the last tenant for life under the settlement, described as the east part of a tenement called *Trevethan*, at the yearly rent of 14*s.* with a heriot of the best beast, or 3*l.* for the same, on the dropping of each life; which lease was contended by the present tenant in tail to be void as not pur-

suant to the power, in as much (inter alia) the *ancient yearly rent* was not reserved. And to prove it his attorney was called as a witness; who produced, first, a paper writing found amongst other papers and muniments relative to the estate in settlement at the mansion-house of the lessor. This paper purported to be a letter, dated in *January* 1728, from one *Hobart* to *Edmd. Prideaux* the younger, named in the settlement, then resident in the *Close* at *Norwich*, where it was directed to him; and on the outside was indorsed "*Jan. 25th* "1728-9. *From* Hobart, *a particular of my estate in* Cornwall." The contents of the letter were as follows: "Manerium de "*Padstow*. Conventionary rents due yearly to *Edmd. Prideaux* "Esq." [Then followed a long list of names of tenants, and their tenements, with the amount of their several rents, continued in line, extending through the whole of the first and part of the second side of the letter; after which follows]

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"Hond. Sir—You have here inclosed an account of all the yearly rack-rents, which are payable quarterly, and the value of the wood and casualties with the rents, according as my deceased master and myself computed it communibus annis: and you have likewise an account of all the conventionary rents set at lease for three lives, both of the manor of *Padstow* and *Huston*, with the two out-leases in *Launceston* and *St. Stephen's* the which I hope will be satisfactory to you. Here are on the place several things which you cannot well be without, and Madam *Glynn* and her son are very willing, as they said, that you should have them at a reasonable value; viz. two ricks of hay, six hhds. of beer, &c. with other small things, and I desire to know whether the books are yours or the executors. I am, honoured, Sir, &c.

Padstow, 25th *Jan.* 1728-9. *Ste. Hobart.*"

(Then follows, on the third side of the letter) "*January* 1728-9." An account of the estates set at a yearly rent within the parish of *Padstow*, belonging to *Edmd. Prideaux*, Esq. (under which is a list of the names of the tenements in one column, of the tenants in another, the covenants for years in a third, the years unexpired in a fourth, and the rents in a fifth. Amongst which are these two items; the first of which was contended to be the premises in question)

"Part of *Trevethan*,	*John Hellyar*,	21	20	£14 0
"Another part of *Trevethan*	*Malachy Spear*,	7	5	12 5"

(the whole amount of these last-mentioned yearly rents are 942*l.*

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942*l.* 9*s.*) The same witness also produced an account book of *Edmd. Prideaux* the younger, found in the same place as the letter, in which were the following * entries: "*John Hellyar, part of* Trevethan, *for* 21 *years, from* Michaelmas 1727, *per annum* 14*l.*—*cleared all to* Michaelmas 1734." Then followed various entries of sums received by *Edmd. Prideaux* the younger from *John Hellyar* in respect of the rent of 14*l.* and concluding with "Total to *Michaelmas* 1738, 14*l.*" Another entry was "*Sept.* 29th 1726, demised to *Malachy* and *Thomas Spear* two fields, the west part of *Trevethan*, for 7 years, 12*l.* 5*s.*" Then followed entries of receipt of rent from these tenants at that rate down to *Michaelmas* 1733: and then "*July* 29th 1735, demised the west part of *Trevethan* to *H. Williams* for 14 years from *Michaelmas* 1735, 12*l.* 5*s.*" from whom an account was in like manner kept of receipts of rent to *Michaelmas* 1741. The indorsement on the letter and the entries of the receipt of rent from the tenants were offered in evidence as a recognition of *E. Prideaux* the younger, tenant for life, by whom they were made, (*a*) that the yearly rent of the tenement in question was truly described in the letter addressed to him, and that both the letter and the entries in the books preserved amongst the muniments of the estate by the successive owners of it, and transmitted from one to another, were evidence of the fact, even as against the defendant, who claimed under the last tenant for life, that the ancient rent of the premises in question was 14*l.* and not 14*s.* which latter was the rent reserved under the defendant's lease. To this it was answered by the defendant's counsel, that the letter in question amounted to no more than hearsay evidence from a stranger of a fact of which there must be better evidence. That the writer of it, supposing him to stand in the relation of a steward to *Edmund Prideaux* the younger, which did not appear, must have obtained his information, if accurate, from the counterparts of the leases; which were the best evidence, and might have been

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(*a*) The proof of this was by comparing the hand-writing of the indorsement and entries with the hand-writing of the signature of *E. Prideaux* the younger to the deed of settlement. The same proof was again admitted by *Le Blanc*, J. at the second trial before him at *Launceston* Spring assizes 1806, who said that at this distance of time no better evidence of the fact than comparison of hands could be obtained, and that he had no doubt it was proper to be received. There was a verdict for the plaintiff on the second trial.

produced;

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produced; and that the paper not binding himself by the acknowledgment of the receipt of rent, which would have been evidence against himself, and a pledge of his accuracy, it did not fall within any of the cases where stewards' accounts had been received in proof of such a fact against third persons. That the indorsement of *E. P.* the younger, to whom it was addressed, did not shew that he had adopted the statement, but merely that such a letter had come to his hands. But that at any rate, if it were evidence against him, yet the subsequent tenant for life, by whom the defendant's lease was granted, who claimed as a purchaser, and between whom and *E. P.* there was no privity of estate, could not be bound by the latter's acknowledgment. Thereupon the plaintiff was non-suited.

In *Michaelmas* term last a rule nisi was obtained for setting aside the nonsuit and having a new trial, on the ground that the evidence of the letter and of the entries was improperly rejected. They were said to be family muniments handed down with the estate from one owner to another, in which all the tenants for life were interested, and preserved as such by each of them in succession: and they were compared to expired leases, which though granted by former owners were evidence for subsequent purchasers of the title, possession, and identity of the property so leased. On a former day in this term,

Burrough and *East* shewed cause against the rule. As to the letter from *Hobart*, it does not appear that he was steward of the estate at the time to the person to whom it was addressed; it is rather to be collected from the contents that he stood in that relation to the prior owner, for he speaks of his late master: he was therefore, for aught appears, a stranger to the estate at the time of writing the letter, and as such had no peculiar duty to discharge in acquiring or giving more accurate information than any other: and no great authenticity was given to the contents of the letter by the indorsement of the then tenant for life than they were intrinsically entitled to; it amounted to no more than an acknowledgment of his having received such a letter: nor unless the paper be evidence per se can the preservation of it with the title deeds of the estate make it evidence. It has never been considered that the owner of an estate admits the truth of every letter and paper preserved amongst his muniments. Then as to the paper itself, it is no more than a parol declaration made by a former steward of the estate to the then owner,

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as to what was the amount of the ancient rent of a certain part of the estate; which would not have bound even the then tenant for life, and much less a subsequent one claiming as a purchaser. The steward must have collected this information, if true, from the counterparts of the leases, which were the best evidence of the fact, and ought now to have been produced, or their non-production at least accounted for before secondary evidence could be admitted. This goes far beyond any of the decided cases. The general rule is that res inter alios acta is not admissible in evidence. The exception has never yet been carried further than to admit the act of a third person, a stranger to
[285] the parties in the cause after his decease, as evidence of a fact supposed to have been within the peculiar cognizance of such third person at the time, where by such act he charged himself with some burthen or debt, which gave another a right of action against him; or admitted a fact which went to destroy his own primâ facie claim, and therefore had an interest against the declaration or admission of the fact. This it is which gives an authenticity to the evidence; for it is to be presumed that no man would charge himself with any debt or burthen, or discharge another from any apparent claim of his own, unless he had reasonable means of information to satisfy himself of the truth of it, and felt himself bound in duty and conscience to declare it. Upon this ground stewards' accounts, wherein they charge themselves with the receipt of money for their masters, have been admitted as evidence of such receipt on the account therein set forth. But in this case *Hobart*, the writer of the letter, does not charge himself at all; he had therefore no interest at stake either in acquiring accurate information of the fact, or in making the communication truly, as he would have had if his own interest had been involved in the consequences of it. All the cases where evidence of this sort has been admitted go upon this ground. In *Warren* v. *Grenville*, (*a*) the principal ground of the decision was the presumption arising from length of time and possession, aided by the acknowledgment of the receipt of the money by the scrivener who prepared the surrender annexed to his bill, whereby he did away his own claim for the amount. And in *Barry* v. *Bebbington*, (*b*)

(*a*) 2 *Str.* 1129. and S. C. in *Goodtitle* v. *The Duke of Chandos*, 2 *Barn.* 1072, 5. (*b*) 4 *Term Rep.* 514.

and

and *Stead* v. *Heaton*, (*a*) accounts delivered were admitted as evidence of the right in which the sums were received, wherewith the parties making such accounts charged themselves to their respective employers. On the other hand, evidence of this sort has always been rejected where the third person making the account or entry did not charge himself or discharge another; as in *Outram* v. *Morewood* (*b*) and *Calvert* v. *Archbishop of Canterbury*. (*c*) The true ground on which counterparts of old leases (for it is the *counterparts* and not the *leases* themselves which are properly evidence for the owner) are evidence of title and possession is the same; the tenant executing such counterpart, thereby binds himself for the payment of rent and performance of covenants to his landlord, which it must be presumed he would not do without having first satisfied himself of the fact at least of his landlord's possession of the premises, and his ability to put him in possession; and this is an acknowledgment by the tenant of his landlord's title, and goes in derogation of the title of the tenant himself, which his possession would primâ facie import. It is material to observe also that in all these cases the accounts, entries, or leases, whereby the parties making them respectively charge themselves, are not made for themselves, to be produced or withheld as may best suit their own purposes afterwards, but derive their authenticity and force from the consideration that they are documents delivered into the hands of those who have an adverse interest to enforce against them, of which the documents themselves furnish evidence against the framers. The same objections apply with at least equal force against the admissibility in evidence of the entries made by the former tenant for life of the receipt of rent for these premises from the then lessee: they were merely [287] private memorandums of his own, not meant to be put into the hands of the lessee, who might avail himself of his admission that the rent had been paid; and he might have suppressed them at his pleasure. And the case of *Outram* v. *Morewood* is directly in point against the admissibility of such entries to prove any right in the owner who made them. If it be said that this was evidence against himself to limit his own power of leasing,

(*a*) 1 *Term Rep.* 669. and *vide* also *Harper* v. *Brook*, T. 14 *Geo.* 3. 3 *Woodds.* 332. and 2 *Bac. Abr.* 637.

(*b*) 5 *Term Rep.* 121. (*c*) 2 *Esp. N. P. Cas.* 646.

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it is to be observed that at the time of the entries made the premises had been leased out, and whatever interest the tenant for life might have had before any lease granted to lower the rent in order to increase the fine, yet after the fine paid and the lease granted his interest would be the other way. After all, the most which it can amount to is an admission by *E. Prideaux* the younger, the former tenant for life, that the rent of these premises at that time was 14*l.* a year: but his admission is no evidence against the defendant who claims from *Humphrey*, a subsequent tenant for life, who claimed as a purchaser; there being no privity of estate between them. And the question is, what was the *ancient rent* at the time of the power created, by which must be understood the ancient *conventionary* rent; and that cannot be proved by shewing what was the *rack* rent reserved under a lease then recently granted in the time of *E. P.* the younger, the second taker for life.

The Solicitor-General, *Lens* Serjt., and *Dampier*, in support of the rule, (after a short attempt which was afterwards abandoned, to maintain that the onus probandi lay on the defendant to shew that the rent reserved was the *ancient* rent, in order to
[288] shew that it was a lease within the power,) relied principally on this, that the letter of *Hobart* purporting to be that of a steward, (which was sufficient for the purpose,) adopted and recognized as it was by the indorsement of *Edmund Prideaux* the younger then tenant for life, and placed amongst the muniments of his estate, and his entries in his book of the receipt of rent for the tenement in question, both which were preserved by *Humphrey*, the succeeding tenant for life, amongst the muniments of the estate, amounted to an acknowledgment by the former tenant for life against his own interest, that the ancient rent was 14*l.* a-year; every tenant for life being interested to reduce the rent as low as possible, in order that he might get a larger fine for renewal. That this was not a declaration by a mere stranger to the estate, but by one who stood in the same relation to it as the party from whom the defendant claimed, and had the same interest against the acknowledgment made by him; and he had acted upon it by the receipt of rent in conformity with the rental given to him. That this differed from *Outram* v. *Morewood*, where the acts of a mere stranger to the estate of the parties in the cause were offered in evidence: whereas this was a question which equally affected the interest of all the tenants for life:

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it did not fall therefore within the objection of res inter alios acta. That counterparts of leases were but the acts of parties connected with the same estate, which were evidence against third persons.

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Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court to this effect.

As to the admissibility in evidence of the paper subscribed by *Hobart*, which was found by the attorney for the lessor of the [289] plaintiff amongst the muniments of the estate, and which appeared by the contents of it to have been written by a person having an intimate knowledge of the property, who was in the confidential employment of the person to whom written, and relative to all his estates in *Cornwall*, of which that of *Trevethan*, put down as at a rent at 14*l.* per ann., was one, and which paper appeared to have been continued by the successive owners of the estate amongst their muniments; it is to be observed, that the person to whom it was addressed, and by whom it was so preserved, was one who was only tenant for life, with a leasing power for 21 years or three lives, upon condition (inter alia) of reserving the ancient rent: and the question is, whether as against him or any other who was under the restrictions of the same power, this paper was not evidence of the amount of the ancient rent? The contents of the paper were adverse to the title of the person who had possession of it: it diminished his interest in the fine or renewal, in the same proportion as it raised the rent to be reserved. The paper was written by a confidential agent at least, though it does not appear that he was the immediate steward of the estate at the time, but certainly, as the contents shew, by one who had an intimate knowledge of it; and it was in some degree recognized as authentic by the then owner of the estate, the tenant for life, by this indorsement written upon it:—"From *Hobart a particular of my estate in* Cornwall;" thereby importing, that the writer bore the degree of relation to the estates and their owner, which he purports to do on the face of the paper, and that the owner considered the paper as an actual particular of his estates. The question then is, whether this declaration of the then tenant for life so circumstanced, (for it is to be considered only as a declaration by him,) as to the existing rent of [290] the

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the tenement in question, be evidence of that fact against a succeeding tenant for life of the estate having a similar limited power of leasing, reserving the ancient rent, who claimed as a purchaser; for if he had derived title from the former tenant for life by whom the indorsement was made, the case would have been quite clear. And we think it is also evidence against the defendant who claims from a succeeding tenant for life. It appears that the former tenant for life, by whom the paper was thus accredited, was not only disinterested in respect of the particular fact of the then existing rent, but that he had an interest the other way, to diminish the amount of it. Then at this distance of time, with the means of knowledge which he had of the fact, and his interest in declaring it the other way, we think that his declaration is evidence of the fact to go to the jury. There are several instances in the books where the declaration of a person having knowledge of a fact, and no interest to falsify it, has been admitted as evidence of it after his death. Thus the written memorandum of a father as to the time when his child was born has been received to prove when the infant would come of age, and that he was in fact under age at the time of making his will. (*a*) And yet the most that can be said for such evidence is the peculiar means of knowledge of the fact by the father, and the absence of all interest in him at the time of the memorandum or declaration made to satisfy the truth in respect to it. So an entry of the receipt of ecclesiastical dues in the books of a deceased rector is evidence for his successor; (*b*) which must also be upon the same ground of an absence of all
[291] interest to mis-state the fact in the rector making such entry, which could not possibly be evidence for himself. Now this paper might, if it had ever met the eye, have been used adversely to the former tenant for life by whom it was authenticated, and could not have been evidence in his favour: he could not therefore have had any undue motive for preserving it. In like manner ancient deeds (*c*) proved to have been found amongst deeds and evidences of land may be given in evidence, although

(*a*) *Herbert* v. *Tucker*, T. Ray. 84.

(*b*) *Anon. Bunb.* 46. 130. and 2 *Ves.* 43.

(*c*) Vide 12 *Vin. Abr.* 84. tit. *Evidence*, (A.) (B.) 5. *Ancient Deeds, pl.* 7. cites *Trip. per. Peis.* 220. 24 *Car. B. R.*

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the execution of them cannot be proved : and the reason given is, " that it is hard to prove ancient things, and the finding them *in such a place* is a presumption they were fairly and honestly obtained, and reserved for use, and *are free from suspicion of dishonesty*." The paper therefore having been found amongst the muniments of the family, accredited by one who could not have used it in his own favour, and preserved by him and by the succeeding tenant for life, against whom it might have been used adversely ; we think that it was evidence to be left to the jury of the amount of the ancient rent at the time it bears date. And upon the same grounds we think that the entries in the book of the receipt of rent made by the same person were also evidence of the fact, which ought to have been submitted to the jury.

Rule absolute.

The

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Tuesday, Feb. 11th.

The King *against* The Commissioners of the Court of Requests in the City of LONDON.

It seems that a *stock-broker* is liable to pay to the chamberlain of *London*, for the benefit of the corporation, the annual duty of 40*s.*, directed by stat. 6 *Ann. c.* 16. *s.* 4. to be received by the chamberlain from every *broker*. But at all events if the chamberlain sue for such duty in the *London* Court of Requests, and that Court decline taking cognizance of the suit, on the ground that the corporation, for whose benefit the duty was to be received, had taken a bond in the penal sum of 10*l.* (the Court having jurisdiction only to the extent of 5*l.*) from the broker, upon which he might be sued in the superior courts, and that the judges of the Court of Requests were freemen of the Corporation interested in the suit, this Court will grant a mandamus to the commissioners to proceed therein; for under the statute of *Ann.* their chamberlain is a *trustee* for the corporation, and a bond taken by them in their own name for securing the 40*s.* duty is no merger of the ordinary remedy given to their chamberlain by the legislature: neither is the right of the chamberlain to sue in the Court of Requests, which has always been the practice, affected by the scintilla of interest which any of the commissioners might be supposed to have as corporators in the duty to be recovered; though it did not appear that all of them had such interest.

THIS was a rule upon these commissioners to shew cause why a mandamus should not issue commanding them to hear and determine a suit instituted in their Court of Requests by the Chamberlain of *London* against *F. Baily*. The object of that suit was to recover for the use of the corporation of *London* the sum of 40*s.*, the annual duty upon the Defendant *Baily* as a broker, which is directed by the stat. 6 *Ann. c.* 16. *s.* 4. to be paid to the chamberlain for the use of the corporation, and which duty *Baily* had paid for several years before, but had refused to pay for the last year, upon the ground that being a *stock-broker* he was not within the meaning of the act. Upon the suit being instituted by the chamberlain before the Court of Requests, which by the stat. 39 & 40 *Geo.* 3. *c.* 104. has summary jurisdiction over causes not exceeding 5*l.* *Baily* objected to the jurisdiction of the Court; contending that he had made no contract with the chamberlain; but that the duty, if payable at all, was payable to the mayor and aldermen, &c. in their corporate capacity, to whom he had given bond in the penal sum of 10*l.* conditioned for the payment of the annual duty of 40*s.*: that therefore the simple contract, if any, was merged in the specialty; and that the specialty debt, amounting to 10*l.* could not be sued for in the Court of Requests. *And further, that the Judges of that Court, being freemen of the city of *London*, were interested in the suit; the money when recovered being for the use of the corporation: and in that respect also that that Court was incompetent to try the cause. The commissioners thought the objection to their jurisdiction well founded, and refused to make any order or judgment in the

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cause. The present rule was obtained on the grounds, that whatever might be the construction of the act of Queen *Ann.* as to *brokers* (which had been often ruled in the superior Courts to include *stock*-brokers) it could be no objection to the *jurisdiction* of the Court of Requests to take cognizance of the chamberlain's claim, that another species of collateral security was given to other persons for the same sum. Nor did the objection of interest in the commissioners arise; for by the acts of parliament constituting the Court of Requests, it is to consist of (besides two aldermen) twenty inhabitants householders of the respective wards, including the common councilmen for the time being, who act for one calendar month in rotation of wards, any three of whom may hear and decide causes where the debt shall not exceed 40*s.*; and in default of a sufficient number attending out of the ward in rotation, the assistance of other commissioners may be called in from the other wards: and out of the whole number there could be no doubt that three disinterested persons might be found to whom the mandamus might be directed. But it was also contended to be no objection though all the attending commissioners were freemen, having no individual interest in the event of the suit; and it not being a Court belonging to the corporation of the city, but an independent jurisdiction constituted by act of parliament: though if it had been a corporate Court, yet from *Wagoner's* [294] case (*a*) down to the present time the chamberlain has always sued for penalties for the benefit of the corporation upon their own by-laws in their own Courts.

The Solicitor-General, *The Common-Serjeant*, and *Dampier* were heard against the rule for the mandamus, and relied upon the objections above mentioned.

Wilson in support of the rule answered them as before; and urged further, that by the statute of *Anne* the chamberlain was made a trustee for *Wm. Stewart*, the then lessee of the corporation, and afterwards for the corporation itself: and that if the question had arisen recently after the act, before *Stewart* was compensated, it could not have been objected that the corporation must have sued. That if the chamberlain had been only an agent or servant of the corporation, and not a trustee, it would be in their power to change him and appoint another to

(*a*) 8 *Rep.* 121. *b.* there called *The Case of the City of London.*

receive

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receive the dues; which they could not do by the express provision of the act. [Lord *Ellenborough* C. J. It seems that the chamberlain must be considered as a trustee for the corporation under the act of parliament; for it directs that, after *Stewart* shall be satisfied the sum due to him out of the money received by the chamberlain, "all the monies, &c. *shall go to and be enjoyed* by the corporation." Now if the chamberlain had been no more than a mere agent or servant of the corporation, the money would have gone to them of course. *The Solicitor-General*, to whom this was addressed, then relied upon there being a specific remedy on the bond, and therefore no occasion
[295] to apply for the extraordinary interference of this Court. To which it was answered.] That there was no other method by which the chamberlain could have the benefit of the Court of Requests, which the legislature meant to give him for the recovery of small debts: and if he were driven to sue in the superior Courts for 40*s.* from each broker, the remedy would be too expensive to be enforced.

Lord ELLENBOROUGH C. J. The right of the chamberlain to sue in the Court of Requests having been already disposed of, the only question is, whether he shall be excluded from the mandamus because of the remedy of the corporation on the broker's bond? But it appears to me that it would be going too far to oust them of their ordinary remedy and benefit which the legislature intended for them of suing in the name of the chamberlain in their own Court, because they have taken the collateral security of a bond to themselves. And if there be any difficulty in directing the mandamus generally to the commissioners, on account of the interest of some of them as members of the corporation, we may direct it to certain of them, as judges of the Court, who are not interested in the receipt of the money.

Wilson however suggesting that it could not make a difference to any individual commissioner, Lord *Ellenborough* said that in that case the mandamus might as well go generally.

Per Curiam, Rule absolute.

Lord

Lord KINNAIRD and Others *against* LYALL.

Tuesday, Feb. 11th.

Though a writ of error abate by the death of the plaintiff in error before it be returned and certified, yet execution cannot afterwards be issued on the judgment without leave of the Court: and the Court refused leave for the plaintiff here to issue a testatum fi. fa. tested in the last term on the return day of the original fi. fa. which was after the allowance and service of the writ of error.

LITTLEDALE on a former day obtained a rule nisi for setting aside the execution issued in this cause for irregularity. The action was brought in *Michaelmas* term 1804, and judgment recovered in *Hilary* 1805. In the same term a writ of error was brought in the Exchequer-chamber, and on the 13th of *November* 1805, in *Michaelmas* term, judgment was affirmed for 2185*l.*; and on the 16th a writ of error to parliament was allowed, which was served on the 18th; but before it was returned and certified, viz. on the 9th of *December* following, the Plaintiff in error died. On the 14th of *January* 1806 a writ of testatum fieri facias issued, tested the 21st of *November* preceding, and returnable the first day of *Hilary* term 1806; the original writ of fieri facias having been tested the first day of *Michaelmas* term 1805, returnable the 21st of *November*. The irregularity complained of was, that the execution issued after the allowance of the writ of error, and after the death of the plaintiff in error. And he contended that the writ of error allowed, though it abated by the death of the plaintiff in error, was sufficient to prevent the issuing of the writ of execution without the leave of the Court: and that the objection was not gotten rid of by the antedating of the writ of testatum fieri facias to a period before the death of the party: for it would still appear to be after the allowance of and pending the writ of error. And he cited *Penoyer* v. *Brace*, (*a*) as in point, and also referred to *Cramborne* v. *Quennel*, (*b*) *Olorenshaw* v. *Stanyforth*, (*c*) and *Hayes* v. *Thornton*, (*d*) to shew that the abatement of the writ of error by death made no difference.

The Solicitor-General and *W. E. Taunton*, in shewing cause, observed that according to the report of *Penoyer* v. *Brace*, in *Salkeld*, the record was certified, which, if accurate, would distinguish it from this case. But

The Court were clearly of opinion that after the writ of error allowed, though afterwards abated by the death of the plaintiff in error, the Defendant in error could not take out execution

(*a*) 1 *Ld. Ray.* 244. *Carth.* 401. and 1 *Salk.* 319.
(*b*) 1to *Barnes*, 201. (*c*) Ib. (*d*) Ib.

without

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without the leave of the Court: and therefore they made the

Rule absolute.

A rule nisi was then obtained to permit the plaintiffs to sue out a writ of execution tested as of last term; against which

Littledale now shewed cause, and referred to the opinion of Lord *Holt* in *Penoyer* v. *Brace*, that a scire facias could only be dispensed with where there was not any alteration of the record, nor any new person made liable to the execution: and here the executor of the plaintiff in error is a new party. And, in answer to a suggestion by the Court, that if a party against whom judgment of the term might be entered up died in vacation, there was no need of a scire facias against his executor;(*a*) he answered, that the vacation was an emanation of the prior term; but here was a new term intervening; and if this could be done now, by the same reason it might be done after two or three terms. And in *Heapy* v. *Parris*, (*b*) though a [298] judgment on a warrant of attorney entered in *Easter* vacation was holden good against a defendant who died in *Easter* term; yet the Court held, that execution could not be sued out upon it till it were revived by scire facias against his representative.

W. E. Taunton, in support of the rule, said, that the justice of the case was with the plaintiffs, and no incongruity would appear upon the record; for that the writ of error in parliament having abated before the return of it, there need be no entry of it on the record; but

The Court said, that was not so; for a minute was entered in the margin of the judgment roll, "error allowed;" and when the entry came to be regularly made out on the record the incongruity would appear. For there must be a suggestion entered on the record to notify the abatement of the writ of error by the death of the plaintiff in error; and that suggestion would state, that on such a day such an one comes by his attorney and gives the court to be informed, that on a certain day the plaintiff in error died: after which it would appear that the Court awarded a writ of execution tested before the death

(*a*) Vide *Bragner* v. *Langmead*, 7 *Term Rep.* 20.
(*b*) 6 *Term Rep.* 368.

of

of the party, while the writ of error was pending. And no doubt if it were any advantage to the defendant here, that the true day of the award of execution should appear upon the roll, he may come and pray the court to have it regularly entered. The only ground on which if a party die in vacation execution may issue as of the preceding term is, because no incongruity then appears on the record: but here if the proceeding prayed for were truly entered, it would be error on the record.

Rule discharged.

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DOE

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Wednesday, Feb. 12th.

DOE, on the Demise of MARK COOK and ELIZABETH his Wife, *against* DANVERS.

The *freehold* of an estate, parcel of a manor, and demiseable only by the licence of the lord, passing by surrender and admittance, to which the tenant was admitted by the description of a customary

THIS was an ejectment to recover the possession of a house and premises, situate in the parish of *St. Dunstan's, Stebunheath*, otherwise *Stepney*, in the county of *Middlesex*. The declaration was intitled of *Hilary* term 44 *Geo.* 3., and was upon two demises by *Mark Cook* and *Elizabeth* his wife, in right of his said wife; the first being laid upon the first of *July* 1800, and the second upon the first of *January* 1802. And at the trial before Lord *Ellenborough* C. J. the following facts were admitted, and a verdict was found for the Plaintiff, subject to the opinion of the Court upon the following case.

tenement, habendum to her and her heirs, tenendum of the lord by the rod, according to the custom of the manor, by the accustomed rent, suit of court, customs and other services, is in the *lord* and not in the *tenant*, though not holden *ad voluntatem domini*. But such an estate, whether strictly copyhold or not to all purposes, may well pass under the description of *copyhold* in a will; the intention to pass it under that description being apparent.

Such customary estate is not within the 5th section of the statute of frauds, 29 *Car.* 2. *c.* 3. so as to require to a devise of it the signature of the party, or the attestation of witnesses. Nor is it within the 7th section, as a declaration of trust, requiring to be proved by a writing *signed by the party*; which applies only to cases where the legal and equitable estates are separated; or by a *will in writing*, which must be understood only of such a will of lands as the statute recognizes, viz. a will attested by three or four witnesses. But held that it might well pass by instructions for a will taken in writing by another, in the presence and from the oral dictation of the party though without any signature or attestation, which was established as her will by the ecclesiastical court granting probate thereof, and is a good *will* under the statute of wills; the estate having been surrendered to the use of her last *will in writing*. Such estates pass, not by the will alone, but by the will and surrender taken together. And the entry of the devisee, after 20 years from the death of the testatrix in 1780, but within 20 years after the determination of a lease in 1800, before granted by her, (rendering rent, with a proviso for re-entry in case of non-payment,) was neither tolled by a descent cast on the defendant from his father, who as heir at law of the testatrix had been admitted in 1782, and had received the rent to the time of his death in 1791, after which the defendant was admitted and received the rent; the doctrine of descent cast not applying to cases where the party has no remedy but by entry, as in the case of a devisee; nor to copyhold or customary estates where the freehold is in the lord. Nor was such entry barred by the statute of limitations 21 *J.* 1. *c.* 16. having been made within 20 years after the old lease expired: the devisee not being bound to enter before, as for a condition broken, by the non-payment to her of rent.

A devise to one by the name of *Mary*, whose christian name was *Elizabeth*, is good, if the jury find from the circumstances that she was the person meant to be designated.

The

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The premises in question are parcel of the manor of *Stebunheath*, otherwise *Stepney*, in *Middlesex*. At a Court holden for the manor on the 12th of *April* 1743, *Thomazine* * *Taylor*, spinster, was admitted to the premises, by the description of "all "that customary messuage or tenement, with the appurte- "nances, on the south side of *Radcliffe Broad-street*, late in the "occupation of —— *Chandler*, butcher; to have and to hold "the said premises, with the appurtenances, under the said *Tho-* "*mazine Taylor*, her heirs and assignees for ever, of the lord of "the said manor, by the rod, according to the custom of the "said manor, by the rent, suit of court, customs, and other "services thereof, heretofore due and of right accustomed. "And she gave to the lord for a fine for such her estate and "entry in the premises 1*l*. 5*s*., and fealty was respited, and so, "saving always the right of the lord, the said *T. Taylor* was "admitted tenant thereof in form aforesaid." At the same court *T. Taylor*, according to the custom of the manor, surrendered (amongst others) the premises in question into the hands of the lord of the manor by the description of "all and singu- "lar her customary messuages, tenements, cottages, lands, and "other hereditaments whatsoever, holden of the lord of the "said manor by copy of court roll, with their and every of "their appurtenances, to such uses, intents and purposes "as the said *T. Taylor* in or *by her last will and testament in* "*writing* should limit, appoint, or declare." The court-books of the manor of *Stepney* now in existence commence in the year 1654, and contain entries of admissions of all the tenants admitted to the premises in question between that period and the 3d of *May* 1791, which are all in the same form. The *habendum* of these entries are also in the same form as that already set forth in the admission of *Thomazine Taylor;* and the admissions are severally followed by entries of surrender by the new tenants to the same uses, and in the same form, as is already set forth in that entry. Other tenements in the manor appear to have passed by grants similar to the foregoing from the commencement of the court-rolls. *T. Taylor*, by indenture "of lease of the 7th of "*June* 1759, by virtue of a previous licence from the lord, "demised the premises in question to *Dorothy Whiting*, since "deceased, for 41 years from *Midsummer-day* then next, at "the rent of 8*l*. per ann., payable quarterly on the usual rent- "days, and subject to the following proviso for re-entry in case "of

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" of non payment: Provided always, that if the said yearly " rent of 8*l.* shall be unpaid for 21 days, &c. or if all defects " of reparations from time to time, &c. be not amended within " three months next after notice in writing, &c.; or if the " said *D. Whiting*, her executors, &c. do not well and truly " keep all and every the covenants, &c. on her and their parts " &c.; that then and from thenceforth, and at all times after- " wards, it shall and may be lawful for the said *T. Taylor*, her " heirs, &c. into and upon the demised premises, &c. to re- " enter, and re-possess," &c. The lessee took possession of the premises under this lease, and she and her representative, Mr. *John Scott Whiting*, (the present tenant in possession) continued to occupy them from the commencement of the lease until the expiration of it at *Midsummer* 1800. On the 3d of *August* 1780 Miss *Taylor*, the lessor, gave directions to her attorney to prepare her will; and he accordingly wrote down the following instructions for it, and was desired to attend her therewith the following morning at 11 o'clock to have it executed. " *Tho-* " *mazine Taylor*, of the parish of *St. Mary Rother* com. *Sur-* " *rey*, spinster, by her will gives to *John Noble*, the father, in " trust for *Richard Noble* and *Thomazine Noble*, all that messe [302] " or tenement situate in *Fish-street-Hill*, *London*, *to* ——— " in trust for his two children, and until their ages of 21 years; " all that copyhold messuage or tenement situate in *Radcliffe-* " *Highway*, within the manor of *Stepney*, to *Mary Cook*, wife " of ——— *Cook*, and to her heirs for ever; no surrender to " use of will ever made; all the residue to *John Noble* abso- " lutely; to be buried in the vault under *Limehouse* church, " where my uncle and aunt *Merwin* lie: and appoints said " *John Noble* sole executor; to Mr. *Francis Mason* my best dia- " mond ring of the value of 50*l.*" Before any will was formally prepared by the attorney, under these instructions, viz. upon the said 3d of *August* 1780, Miss *Taylor* died, leaving *Thomas Danvers*, father to the present Defendant, her heir at law. These instructions were, upon the 25th of *February* 1782, pronounced for and established as the only will of Miss *Taylor* by the prerogative court, and probate thereof was afterwards granted accordingly. Upon the 21st of *June* 1782 *Thomas Danvers* was admitted to the premises in question, as heir at law of *T. Taylor*, in the accustomed form above set forth. The rent was paid to *Thomas Danvers* from the time of Miss *Tay-* *lor's*

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lor's death until his own death in *January* 1791, and from that time until the expiration of the lease to his son *James Danvers*, the defendant, who, upon his father's death, was admitted 3d *May* 1791 to the estate as his heir at law, in the same form as his father was admitted; and, upon the expiration of the lease, made a new devise to Mrs. *Whiting*, under which the latter held, and paid rent as tenant to the defendant, at the time of the demises laid in the declaration. The lessor of the plaintiff *Elizabeth* was admitted to the premises upon the first of *December* 1801, to hold to her and her heirs of the lord, according to the form of the entry before set forth. Her marriage with the other lessor was proved at the trial: and it was also proved that the testatrix had no other relative of the name of *Cook*, except the lessor of the plaintiff, *Elizabeth*, and that she was the person who was intended to take by the name of *Mary Cook*, as described in the instructions of the 3d of *August* 1780. The question for the opinion of the Court was, Whether the lessors of the plaintiff were, under the above circumstances, entitled to recover?

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This case was argued in *Trinity* term last by *Lawes* for the plaintiff, and *Nolan* for the defendant, and again in *Michaelmas* term last by *Gibbs*, *Solicitor-General*, for the plaintiff, and *Marryat* for the defendant. The arguments ran to great length, and for brevity sake I shall reverse the order in which they were delivered.

The lessor of the plaintiff *Elizabeth Cook*, whom the jury found to be the person intended by the description of *Mary Cook*, in the paper of instructions for a will prepared by the attorney of *Thomazine Taylor*, and not signed by her or attested, but which was pronounced to be her will by the prerogative court, claimed the premises in question under such will by the description of *copyhold*; to which premises *Thomazine* had been before admitted by the description of all that *customary* tenement, *habendum* to her and her heirs, *tenendum* of the lord by the rod, according to the custom of the manor, by the rent, suit of court, customs, and other services, &c., and had before surrendered, by the description of *customary* lands, &c. holden by copy of court-roll, to such uses as she by her last *will and testament in writing* should appoint. But though the testatrix died in *August* 1780, and the will was established in *February* 1782, yet owing to an outstanding lease granted by the testatrix in

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her lifetime, which did not expire till *June* 1800, the devisee did not enter or bring ejectment till *Hilary* term 1802, but suffered the heir at law of the testatrix, who was admitted to the premises in 1782, and afterwards the defendant his son, to whom they descended in 1791, to take the rent during the intermediate time; and this although there was a proviso in the lease for re-entry in case of non-payment of rent.

Upon these facts the defendant's counsel took four objections to the title of the lessor of the plaintiff *Elizabeth* (the devisee) to recover in this action. 1st, That the premises in question were not *copyhold*, but *customary frechold*, and as such were within the fifth clause of the stat. of Frauds 29 *Car.* 2. *c.* 3. and could only pass by a will in writing signed, &c., and attested by three witnesses. Or if not within that branch; then 2dly, that they were within the 7th or 9th section, and could only pass by *a will in writing, signed by the party*, as a declaration or assignment of a trust. But if they were well passed by the will; then 3dly, that the lessors right of entry was either tolled by the descent cast on the defendant; or 4thly, that it was barred by the statute of limitations, 21 *Jac.* 1. *c.* 16.; and that either, 1st, by the non-receipt of rent under the lease granted by the testatrix for more than 20 years since her death; and the defendant and his father having during all that time had an adverse enjoyment of such rent and of the premises: or 2dly, by the lessor *Elizabeth* not having availed herself for more than 20 years of her right of entry under the proviso in the lease for non-payment of rent, or otherwise.

First, the estate not being holden *ad voluntatem domini* though by copy of court roll, is not *copyhold*, properly so called, but *customary freehold*, the freehold of which is in the tenant, and not in the lord, who is only an instrument to convey it; insomuch that in pleading, title would be deduced not from the lord but from the person last seised. *Britton* (*a*) considers customary tenants as socmen, and not villein socmen, as *Bracton* (*b*) does: and *Blackstone*, (*c*) who was at the bar when he wrote his Treatise of Copyholds, though he adopts *Bracton*'s opinion, yet admits that these tenants are called in some books *freeholders* generally, and in all others *customary freeholders*, and that they have a *freehold interest*, though he denies that they have a *freehold tenure*, both

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(*a*) C. 66. *p.* 165. (*b*) *L.* 1. *c.* 11. *f.* 4. *tr.* 1. *c.* 23. *s.* 5.

(*c*) *Considerations on Copyholds*, *p.* 95. and 111. of his tracts.

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of which he contends to be necessary for a right of voting for a county: and in *Fitzh. N. B.* 11 *M.* and 12 *B.* they are considered as tenants in ancient demesne. But whether villein socmen, or pure socmen, must depend upon the nature of their services, all of which are certain and free in this case. All the authorities are collected in *Roe* d. *Conolly* v. *Vernon*, (*a*) particularly *Hughes* v. *Harrys*, (*b*) *Gale* v. *Noble*, (*c*) *Crouther* v. *Oldfield*, (*d*) *Anon.* 11 *Mod.* 53. and *Rogers* v. *Bradley*, (*e*) which establish the distinction between copyhold and these customary estates, which are considered to be freehold. Then the testatrix having named the premises as *copyhold* in her will cannot alter the tenure; though it may raise a question how far a *freehold* interest can pass under such a description, and where the estate was not surrendered to the use of the will. Though lands have sometimes passed with a mis-description annexed, yet in all those cases there have been general words sufficient to carry the estate; and it has only been considered that the addition of a mis-description should not hurt the operation of the general words. [*Lord Ellenborough* C. J. We must take it upon this case that the testatrix meant her customary land, having no other description of land in the manor.] If then the freehold be in the tenant and not in the lord, as in case of copyhold, the will ought to have been attested by three witnesses, and executed according to the fifth section of the statute of frauds, (*f*) which directs that "all devises of any lands, &c. deviseable either by force of the statute of wills, or of that statute, or by force of any particular custom, &c. shall be *in writing*, and *signed by the party*, &c. and shall be attested, &c. by three witnesses, &c. or else be void." Now, by the first statute of wills, (*g*) power was given to dispose of all lands, "*of the nature of soccage tenure;*" and the second or explanatory statute was not meant to restrain the nature of the property capable of being devised, but merely the power of those to devise it who had not the whole interest in the subject matter, such as tenants for life or in tail, &c. In *Tuffnell* v. *Page*, (*h*) copyholds were indeed

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(*a*) 5 *East*, 51. and vide *Doe* v. *Huntington*, 4 *East*, 271.
(*b*) *Cro. Car.* 229. (*c*) *Carth.* 32.
(*d*) *Style*, 364. 2 *Ld. Raym.* 1235. and 1 *Ludw.* 125.
(*e*) 2 *Lutw.* 143.
(*f*) 29 *Car.* 2. c. 3.
(*g*) 32 *H.* 8. c. 1. explained by st. 34 & 35 *H.* 8. c. 5.
(*h*) 2 *Atk.* 37. and *Barnard Ch. Rep.* 9.

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holden not to be within the statute of frauds; and though it may now be too late to controvert that construction, yet it has been often since disapproved of, and it has been said that it ought not to be carried further. (*a*) And in *Hussey* v. *Grills* (*b*) Lord *Hardwicke* seemed to think that customary freeholds, being of a very different nature from copyholds, would not be governed by the same rule which took the others out of the statute. And it cannot be objected that these estates pass by surrender, and not by will, and are therefore out of the statutes of wills; for the same objection would have applied to many wills good by custom before those statutes, and which are expressly within the fifth clause. [The Court, upon a doubt started, whether without a custom to surrender to the use of the will expressly found they could infer such a custom, said that upon the facts stated in the special case they would assume the existence of it; especially as their decision would not conclude the defendant, but he might bring another ejectment in case the judgment of the Court should be against him now.] Then secondly, supposing that the will, *as such*, need not be attested by three witnesses, within the fifth section, yet, as a *declaration or assignment of a trust*, it ought to have been *signed by the party*, as required by the seventh and ninth sections of the statute of frauds. The seventh section says, "that all declarations or creations of trust or confidence of *any* lands shall be manifested and proved by some *writing signed by the party*, who is by law enabled to declare such trust, or *by his last will in writing*, or else shall be void." The eighth section excepts trusts arising by implication of law. And the ninth section enacts, "that all grants and assignments of any trust or confidence shall likewise be *in writing signed by the party* granting, &c. or by *such last will*, or else shall likewise be void." These clauses are general, extending to *all* lands; and the first question will be, whether the trusts here spoken of are to be confined to cases where the legal is separated from the equitable estate, and where such trust or confidence is declared or created by the party having the legal estate, as will be contended on the other side? But if that were so, many cases

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(*a*) By Lord *Macclesfield* in *Wankford* v. *Wankford*, 2 *P. Wms.* 259, and by Lord *Hardwicke* in *The Attorney-General* v. *Andrews*, 1 *Ves.* 225, and *vide* the opinions of *Buller* J. and Lord *Loughborough* C. in *Habergham* v. *Vincent*, 2 *Ves. jun.* 232, and 237.

(*b*) *Ambl.* 291.

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would be taken out of the protection of the statute which are clearly within the mischief intended to be remedied, and which have always been considered to be included. A party may declare a trust of land who has no legal interest to pass, as in the case of one who has a contract for the purchase of land, or an agreement for a lease, &c. A fine also may be levied of an equitable estate; and unless the seventh clause attaches, the uses of the fine might be declared by parol. [It was observed e contra that their argument was not confined to cases where the trust was declared by the same instrument which separated the legal from the equitable estate, but would extend to all cases where the legal and equitable estates were separated.] Here then, after the death of the surrenderor, the legal estate, which cannot be in abeyance, descended to her heir, and the will operated as a declaration of trust for the use of the person for whom the previous surrender had been made, and transferred the interest from the heir to the devisee. And it is no answer to say that the same objection would apply to the case of every common surrender: for that is expressly provided for and excepted out of the operation of the third clause of the statute; which says, "that no leases, estates, or interests, &c. (*not being copyhold or customary interest*) in any manors, lands, &c. shall be assigned, granted, *or surrendered* unless by deed or *note in writing signed by the party*, &c. which shews that without such exception surrenders must have been *signed by the party*. So a term of years devised by such a will, (the legal interest of which vests in the executor until his assent to the devise, who it may be said is a trustee for the devisee,) is either not within the seventh clause, which has the words, "lands, tenements, and hereditaments," meaning the realty in contradistinction to chattel interests, or is within the exception of the eighth section as a trust arising by implication of law. Then if the instrument be not sufficient as a declaration of trust *in writing* to pass the estate for want of its being signed, neither is it sufficient for that purpose as a *last will in writing* within the other branch of the same clause. By the words "*will in writing*" cannot be meant any such will as the ecclesiastical court would grant probate of, for that would include *nuncupative* wills, in direct contradiction to the plain intent of the statute, which requires the will to be *in writing*. The more obvious construction is to refer it to such will in writing as is before mentioned, namely, a will in writing

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authenticated, if not by the attestation of three witnesses, at least by the signature of the party, as is required by the same clause to every other declaration of a trust in writing: and the legislature could not have meant that a declaration of a trust by will should be less authentic than by any other writing. The ninth section has the words "*such* will," and the construction of that must be the same as of the seventh section. [Lord *Ellenborough* C. J. and *Lawrence* J. observed that the seventh section had not the word *such*, and that the ninth section, referring to *such will*, meant merely *such* a *will in writing* as is intended by the seventh section.] All the cases, except *Carey* v. *Askew*, (*a*) seem to consider that a will of copyhold surrendered must not only be in writing, but signed by the party, within the statute. *Tuffnel* v. *Page*, (*b*) and *Roe* v. *Heyhoe*. (*c*) And so was the fact in the *Attorney-General* v. *Andrews*. (*d*) The precise
[310] facts in *Carey* v. *Askew* do not distinctly appear; and upon searching the register's office, no decree is to be found either of the term mentioned in the report, or for some terms before and after that. And it seems strange that the probate of the ecclesiastical court should be considered conclusive to pass real property, with which the ordinary has no jurisdiction to meddle; thereby conferring a power upon another which he does not himself possess. That weakens the authority of the case, which was also shaken in *Habergham* v. *Vincent*, (*e*) where the instrument was signed by the party. The instrument in question is in truth no more than a nuncupative will, having neither signature nor witness to authenticate it as the act of the testatrix; and if it be good to pass copyhold or customary estate, property of that description is less guarded than personalty exceeding 30*l.* in value, the disposition of which by a nuncupative will has several checks imposed on it by the nineteenth section of the statute of frauds, none of which were observed in the present case. Thirdly, the lessor's right of entry, if any once existed, was tolled by the descent cast on the defendant. *Thomas Danvers*, the defendant's father, and heir at law of the testatrix, was admitted into possession in 1782, and received the rent from her death in 1780 till his own death in 1791, when the

(*a*) 2 *Bro. Ch. Cas.* 59.
(*b*) 2 *Barnard. Ch. Rep.* 9. Vid. S. C. 2 *Atk.* 37.
(*c*) 2 *Blac.* 1116. (*d*) 1 *Ves.* 225.
(*e*) 4 *Bro. Ch. Cas.* 353, 372, 384.

estate

estate descended to his son, the defendant. Now admitting, according to *Co. Lit.* 240. *b. s.* 392. and *Matheson* v. *Trott*, (*a*) that the doctrine of descent cast does not apply to a devisee (though it is to be observed that in the latter case the Judges, who at first differed in opinion, afterward decided the case on a collateral ground) yet that distinction will not assist the plaintiff; if, as he contends, the estate pass by the surrender [311] and not by the will. Fourthly, at any rate the lessor of the plaintiff is barred by the statute of limitations, 21 *J.* 1. *c.* 16., more than twenty years having elapsed since her right of entry accrued in 1780, on the death of *Thomazine Taylor*. 1st, Considering the estate as *copyhold*, the admittance is the investiture of the tenant, and no attornment is necessary; (*b*) and a copyholder, having a right or title to admittance, which vests in him the whole seisen, is barred if he do not claim to be admitted within twenty years. *Bro. Abr. Limitations, pl.* 2. cites 6 *Ed.* 6., *Shaw* v. *Thompson*, (*c*) and *Roe* v. *Hellier*. (*d*) Here however, it is the stronger, because the defendant and his father, heirs at law of the testatrix, have had an adverse possession by admission and by the receipt of the rents and profits for above twenty years since the lessor's title accrued. For an heir is in by descent, and may bring ejectment before admittance, though a devisee or a surrenderee cannot; (*e*) and on admittance upon descent the heir is tenant immediately from the death of his ancestor. (*f*) 2dly, taking this to be *freehold*, the lessor of the plaintiff is also barred by his laches; and it is no answer to say that the outstanding lease, which continued to run till *Midsummer* 1800, prevented his entry before; for it was still competent to him to have entered without committing a trespass; as to demand rent, or fealty, or to obtain seisen of the freehold. [*Lawrence* J. Must not an entry to avoid the statute of limitations be an entry for the purpose of taking pos- [312] session: (*g*) and how could the lessor have lawfully entered for that

(*a*) *Owen*, 111. and 1 *Leon.* 209.

(*b*) *Scamerton* v. *Miller*, *Hob.* 177. and *Leon.* 1 *Leon.* 290. 1.

(*c*) *Moor*, 111. (*d*) 3 *Term Rep.* 162. 171.

(*e*) *Roe* v. *Hicks*, 2 *Wils.* 15. 16 *Co. Cop. s.* 59. *Supplem. s.* 4.

(*f*) *Co. Cop.* 112. *s.* 11.

(*g*) In *Shepherd's Epit.* (tit. *Entry*,) a book which was much commended by the late Mr. Justice *Buller*, it is said of an entry into lands, that

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that purpose during the continuance of the lease? If this were so, a right of entry might be preserved, even after an ouster of the rents and profits, for above 60 or 1000 years; which would entirely defeat the object of the statute which was to quiet men's possession: and it would be incongruous to hold that an ejectment might be maintained after a real action was barred by length of time; and that such an effect should be produced by a tenancy from year to year, or even a tenancy at will.] The tenant in possession, according to *Taylor* v. *Horde*, (*a*) enjoys as the covenanted bailiff of the tenant of the freehold: and as a recovery of a term does not displace the freehold, so according to *Co. Lit. s.* 411. there may be a desseisin of the freehold, pending a term, which shall be no ouster of a term: but *Taylor* v. *Horde*, (*b*) shews that a mere entry on the land for another purpose does not operate as a disseisin of the tenant in possession, so as to make a good tenant to the præcipe. [Lord *Ellenborough* C. J. Disseisin is said to be a personal trespass, a tortious ouster of the seisem of another. (*c*) And in *Salk.* 246. Lord *Holt* says that there can be no desseisin without an actual
[313] expulsion. (*d*) But can you shew that the devisee could have entered to vest the seisen in herself without committing a trespass upon the tenant in possession? because the law does not require a person to do that which would make him a wrongdoer. (*e*)] She might have had a writ of entry (*f*) during the

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that "It is most properly taken for the taking or having of possession of lands or tenements; but it is also used for a writ of possession," &c. "and he that hath a lawful power to enter is said to have a right or title of entry," &c. "and by this entry, if he have right, he brings the possession and right together."

(*a*) 1 *Burr.* 113. (*b*) Ib. 111. 115.

(*c*) Vide *Co. Lit.* 153. *b.*

(*d*) Vide *Lord Townsend* v. *Ash*, 3 *Atk.* 339. So *Sheph. Epit. Disseisin* "Disseisin is where a man entereth into the lands or tenements of another, and *putteth him out* where his entry is not lawful." This is intended of actual disseisin. For the doctrine of disseisin *by Election*, where a party for the sake of certain remedies is entitled to consider himself dissei'sed, vide *Taylor* v. *Horde*, 1 *Burr.* 110, 111, &c.

(*e*) Vide *Bro. Assize, pl.* 163.

(*f*) For the several writs of entry, vide *Co. Lit.* 238. *b.* and *Fitz. N. B.* 442. 461. 473, 474. and 477. which are adapted to specific cases: but vide the stat. of *Westm.* 2. *c.* 24.

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continuance of the lease, for the purpose of asserting and establishing her right. Ouster of *seisin* is distinct from ouster of *possession*. Receipt of rent by a stranger is a desseisin; (*a*) and yet there is no ouster of possession. And at any rate there might have been a symbolical delivery of customary lands in lease by admittance subject to the lease. Besides, the devisee might have brought a real action, wherein the judgment is ut haberet seisinam, &c. without saying any thing of the possession: and there the demandant counts upon his seisin, and not upon possession, as in ejectment. And if the fact of the land being in lease do not bar the seisin of the owner, there is no reason why it should bar his entry for the purpose of giving him seisin. The devisee might have justified in trespass brought by the tenant, that she entered in order to vest the seisin in herself, or to assert her right whatever it might be against the party claiming and taking the rent, and not to oust the tenant. She might also have entered to distrain for the rent. And at all events as there was a clause in the lease for the re-entry in default of payment of the rent, the devisee might have availed herself of the forfeiture to [314] enter and keep possession above 20 years ago. The statute of limitations has always been construed favourably with a view to quiet possessions. (*b*) And the question, whether receipt of rent by one tenant in common for above 20 years were an ouster of his companion, (*c*) could never have occurred, if an adverse receipt of rent for such a length of time had not been considered as a bar. Now here the defendant, and his father before him, have had an adverse possession by receipt of the rent for above 20 years, which is not only a bar to the lessor's remedy by ejectment, but gives the defendant a title to the possession, from whence he can only be removed by a real action: and this distinguishes the case from *Doe* d. *Orrell* v. *Madox*, (*d*) where the only question was, whether it were necessary for the lessor of the plaintiff to shew a receipt of rent within 20 years on an outstanding lease; which was holden not to be necessary.

(*a*) i. e. At the election of the party, vide *Blunden* v. *Baugh*, *Cro. Car.* 303. and *Litt.* s. 388, 389.

(*b*) *Doe* v. *Jones*, 1 *Term Rep.* 300. *Doe* v. *Shaw*, *M.* 28 *Geo.* 3. Ib. 306. *n.* And *Doe* v. *Jesson*, 6 *East*, 80.

(*c*) *Doe* v. *Prosser*, *Cowp.* 217.

(*d*) *Runnington's Ejectment*, 453.

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Arguments for the plaintiff.

First, Whether this be customary freehold, as some say, or privileged copyhold, as others think, *Blackstone*, who in his treatise on Copyholders collects all the learning and authorities upon the subject, arrives at the conclusion that the *freehold* is in the *lord*, and not in the *tenant;* and this is supported by the subsequent cases. Estates of this description vary in nothing from strict copyholds, except that they are not stated to be holden *at the will of the lord*. But as the tenant cannot lease without a licence, there must be some interest remaining in the [315] lord, and that interest must be freehold. Here too this estate is found to be *parcel of the manor*, and not to be *holden of the manor;* the legal inference from which is that it is *copyhold*, according to *Brittel* v. *Bade;* (*a*) and this is supported by *Crowther* v. *Oldfield;* (*b*) though the first resolution there takes a distinction, as some other cases mentioned have done, between copyhold and customary estates, which has been since over-ruled: for in *Stephenson* v. *Hill* (*c*) it was expressly decided that the freehold of such customary estates is in the lord; and in *Doe* v. *Huntington*, (*d*) and *Roe* v. *Vernon*, (*e*) it was considered that they partook of the nature of copyhold. Then being holden *by copy*, the estate was sufficiently described as *copyhold* in the will, and at any rate was plainly intended to pass by that description. If then it be copyhold, or of the nature of copyhold, it is clearly not within the 5th section of the statute of frauds, requiring all devises of land, deviseable by the statute of wills or by that statute, to be in writing, and signed, &c. and to be attested by three witnesses. For property of this description does not pass by the will alone, but by the surrender, the uses of which are directed by the will. This is decided by all the cases from *The Attorney-General* v. *Barnes*, (*f*) *Attorney-General* v. *Andrews*, (*g*) *Wagstaff* v. *Wagstaff*, (*h*) *Tuffnell* v. *Page*, (*i*) to *Carey* v. *Askew*. (*k*) The opinion of Lord *Hardwicke* C. in *Tuffnell* v. *Page* is express, that the 5th clause of the statute of frauds is confined to such estates as pass by the statute of wills 34 & 35 *H.* 8. *c.* 5. explaining the prior statute

(*a*) 1 *Ld. Raym.* 13.
(*b*) 3 *Burr.* 1578.
(*c*) 5 *Ves.* 71-75.
(*d*) 1 *Esp.* 205.
(*e*) 2 *Wils.* 23.
(*f*) 2 *Ves.* 351.
(*g*) 1 *Ves. Sen.* 225.
(*h*) 2 *Atk.* 598.
(*i*) 2 *P. Wms.* 258.
2 *Bro. Ch. Cas.* 59.

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of 32 *H.* 8. *c.* 1. and confining the term *estates of inheritance*, there mentioned, to estates of *fee simple*, and therefore does not include *customary* * estates; which he said had been settled ever since *The Attorney-General* v. *Barnes*. And this is not overruled, as supposed, by what is said in *Hussey* v. *Grills*, (*a*) which is not very clearly reported; for it should rather seem that the codicil, and not the will, was not attested according to the statute of frauds; the question stated being, whether the codicil were a good revocation of the will. At any rate it is distinguishable from the present case, inasmuch as there was no custom there to surrender to the use of the will; and Lord *Hardwicke* said that as there was no legal method of passing the legal estate in that way, there was no reason for holding it out of the statute: and that as the legal estate was not within the statute, so was not the trust; the surrenderee there having covenanted to surrender to such uses as the customary tenant should by deed attested by two witnesses or by will appoint. Whereas here the estates have always been surrendered to the use of wills. Secondly, the will was not necessary to be signed by the party, as a declaration of trust within the 7th section, nor consequently within the 9th section of the act. Those sections only apply to cases where the *legal* is separated from the *equitable* estate, whether by the instrument in question or by any other instrument declaring or assigning the trust. But this is a mode established by custom of passing the legal estate itself; and no trust or confidence is created or declared for another, apart from the legal estate; nor is the legal estate separated for an instant from the equitable estate, but both pass by the surrender and will together. The legal estate continues in the surrenderor notwithstanding the surrender, and would descend to his heir in case of his death until the admittance of the person designated by the surrender. If the will be a declaration of a trust or confidence within the 7th clause, so is every surrender to the use of another; but though surrenders be in writing, they never are signed by the parties; and to hold that to be necessary now for the first time would shake all the copyhold property in the kingdom. Suppose a surrender to the use of a will already made, the surrender would then declare the use as much as the will is said to do now; and if the one be a declaration

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of trust, it is difficult to say that the other must not be so. [*Lawrence* J. observed that in the report of *Tuffnell* v. *Page* by *Barnardiston*, (*a*) Lord *Hardwicke* is made to say that "when the will is in writing and *signed by the party*, that is sufficient," &c.] That is not stated in the report of the case by *Atkins*: and taking the whole sentence together in *Barnardiston*, it seems a strange mode of expressing an opinion that a will of copyhold ought to be *signed* by the party. For in stating what is *necessary*, he only says that it must be in *writing*: though he adds, that when it is in writing, &c. Lord *Hardwicke* had before stated that it need not be attested; and when he was pointing out what was necessary, and says that it must be *in writing*, it is strange that he should not then have added, if such were his meaning, that it must be *signed by the party*. If, however, this be a case at all within the statute, the 7th clause has been complied with: for that only requires the trust to be declared by *a will in writing*, without the additional circumstance of being *signed by the party*, as required to any other sort of writing declaring a trust: and the difference of the expression makes it the stronger. And if *writing* meant a *writing by the party*, then his signature alone would not be sufficient. But a writing by the command of the party has been holden sufficient within the statute of wills; and signing has never been decided to be necessary in a will of copyhold, but the contrary has always been taken for granted. The words *will in writing* were used in contradistinction to nuncupative wills: and the objection, if valid, would extend equally to a will of leasehold. Indeed such a will, strictly considered, operates more as a declaration of trust than the present; for if a term be bequeathed, no legal interest passes to the legatee before the assent of the executor, but the whole interest vests in the executor; though if there be sufficient assets to pay debts a court of equity will compel him to convey to the legatee: but it is clear that such a will need not be signed by the party. Again, suppose a term vested in *A.*, who declares the trust of it to be for *B.*, and then *B.* makes a will not signed, and bequeaths the trust of the term to another:

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(*a*) *Barnard. Ch. Rep.* 9. The whole sentence is this, "So far indeed is necessary, that the will in such case must be in writing; but when it is in writing, and signed by the party, that is sufficient for such purpose."

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that would be a case directly within the words of the 9th section, as construed by the defendant; yet it is clear that the term would pass by such a will. Then if a leasehold would pass, it is sufficient to pass copyhold. The statute of frauds leaves the case of copyhold, with respect to its passing by will, as it found it. Nuncupative wills are sufficiently guarded by the 19th section of the act; and as to them no instance occurs in the books of frauds attempted to be practised, though very many with respect to written wills; which shews that the checks put on the former by the legislature have been sufficient. And in regard to copyhold there is an additional check, that the will must be warranted by the surrender. In the second edition of *Bro. Ch. Cas.* it appears that the instructions for the will in *Carey* v. *Askew* were not signed by the party; and so [319] it appears in the note of that case added by Mr. *Cox* to the report of *Wagstaff* v. *Wagstaff*, 2 *P. Wms.* 259. *Signature* is unknown to the law of *England*, except by positive statutes, and by the Law Merchant in case of bills of exchange: neither deed nor will need be signed at common law, though it might have been required by particular custom. Thirdly, as to the descent cast having tolled the entry of the lessor; that doctrine does not apply to cases where the party has no other right than that of entry, such as the case of a devisee; (*a*) nor to customary or copyhold estates where the freehold is in the lord. (*b*) But at any rate a descent cast can only toll an entry where an entry might lawfully have been made; but the devisee had no right of entry pending the lease granted by the testatrix, which did not expire till 1800, and the law will never compel a person to be guilty of a trespass in order to acquire a right. Fourthly, the same answer applies to the objection that the entry of the lessor of the plaintiff was barred by the statute of limitations. (*c*) No other right or title of entry is within that statute, except that which is accompanied by a right of possession, which the lessor could not have pending the lease. And the payment of the rent during part of the time to the defendant and his father would not of itself make the holding of the tenant wrongful, but is still continued legal under the original term, as the lessor was not bound to take advantage of the forfeiture and re-enter for the condition broken. Besides, the devisee, claiming under

(*a*) Co. *Lit.* 240. *b.* (*b*) Vide ib. 240. *a.* (*c*) 21 *J.* 1. *c.* 16.

the

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the will, was not bound to enter till the will was established, which was not till 1782, between which time and the bringing of the ejectment there was not an adverse possession of 20 years. *They also referred to *Doe d. Orrell* v. *Madox*, *Run. Eject. App.* 458.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court.

In the several arguments of this case many points were agitated, and much ingenuity exercised upon questions about which the Court has not entertained any doubt. As, 1st, Whether this estate in question be strictly copyhold, or customary freehold? 2d, Whether if not strictly copyhold, it passed by the will of *Thomazine Taylor* by the description of all that *copyhold* messuage, &c.: or, more properly speaking, whether the will, making use of such description of the property, be sufficient in point of description to direct the uses of her previous surrender? 3d, Whether the entry were tolled by the descent cast? And, 4th, Whether the lessor of the plaintiff's right of entry be not barred by the statute of limitations; there having been an adverse enjoyment of the rent for a longer time than 20 years? And supposing the circumstance of the estate having been during all that time enjoyed by a tenant under a lease granted by the testatrix, and which expired only in 1800; the defendant in that case contended that by not paying rent the tenant had committed a forfeiture more than 20 years ago, which gave the lessor of the plaintiff a right to enter; and not having done so within 20 years, she was on that account also barred. To these several objections to the right of the plaintiff to recover, satisfactory answers have been given in the several arguments; and it will not be necessary to go into them at any length. This estate appears by the case to be parcel of the manor, to be

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holden by copy of court roll, to pass by surrender and admittance, to have been leased under a previous licence from the lord, and to have been surrendered by *Thomazine Taylor*, the testatrix, according to the custom of the manor, to such uses as she in or by her last will and testament *in writing* should appoint. So circumstanced, it appears to us that whether holden at the will of the lord or not, the freehold is in the lord, and not in the tenant; and that with respect to all the questions arising in this case it is to be taken and considered as *copyhold*. And in her will

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will the testatrix calls it "all that *copyhold* messuage or tenement situate in *Radcliffe Highway*, within the manor of *Stepney*." It is not pretended that she had any other estate to which this description could apply; and supposing it to be a misdescription, which we by no means think it is, there cannot be a doubt but that if by such description she meant the estate in question, it may well pass by such designation. So as to the other objection, that the right of entry of the lessor of the plaintiff is tolled by the descent from *Thomas Danvers* to the defendant *James Danvers*, his son and heir; two satisfactory answers have been given: that the objection does not apply to copyholds, or customary estates, where the freehold is in the lord; nor to cases where the party has no remedy but by entry. In like manner to the objections on the ground of the statute of limitations; the estate having been in the hands of a tenant till 1800, holding under a lease granted by the testatrix, is a sufficient answer; for during that lease the lessor could not enter or support an ejectment: and if a forfeiture were committed, she was not obliged to enter for the forfeiture.

But the point upon which the Court entertained a doubt, and on which they desired a further argument, was, how far [322] the will, as stated in the case, could be considered as a will *in writing* within the terms of the surrender to the use of her will; and whether such will must not, under the 7th and 9th sections of the statute of frauds, be signed by the party, as thrown out by Ld. *Kenyon* in *Doe ex dem. Tempest* v. *Dancer*, (*a*) and according to what is reported to have been said by Lord *Hardwicke* in *Tuffnell* v. *Page*; that when such will is in writing and signed by the party, that is sufficient for such purpose. But we are now satisfied that a will to direct the uses of a surrender of a copyhold, or of a customary estate passing by surrender, is not within the statute of frauds, and needs not be signed, unless such signature be required by the terms of the surrender to the use of the will. We are not at liberty now to agitate the question, whether immediately after making the statute of frauds it might not have been the sounder construction to have held that copyholds were comprised within the general words of the 5th and 6th sections of that act, "All devises and be-

(*a*) This was in 1790. A compromise was recommended by Lord *Kenyon* and acceded to.

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quests of any lands or tenements," an uniform course of decision since that statute has fixed the law not to be shaken, that the land passes by the surrender and will, taken together, in the same manner as if the devisee's name were inserted in the surrender, and does not pass by the will. And on that account a will of copyhold land is holden not to be a devise or bequest of lands or tenements within the 5th and 6th sections of the act. The 7th section requires all declarations or creations of trusts or confidence of any lands to be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writ-
[323] ing. And section 9th requires all grants and assignments of any trust or confidence to be also in writing, signed by the party granting or assigning the same, or by such last will or devise. It was contended on behalf of the defendant, that under these clauses of the act a declaration or creation of a trust, as also a grant or assignment of any trust, must be in writing signed by the party, or by will signed by the party: and that a will directing the uses of a surrender was a declaration or an assignment of a trust. The gentlemen who argued on the part of the defendant felt the difficulty of pointing out the particular sort of will required by these clauses to declare or to grant or assign a trust of lands: they felt that if they insisted on a will attested by three witnesses, they had to encounter every decision respecting a will of copyhold, which had laid it down that a will attested by three witnesses was not necessary: and in no clause of the statute is there to be found any description of a will of land other than such as shall be so attested. When the nature of the conveyance of a customary estate passing by surrender to the use of a will is considered, it will appear plainly, that such conveyance is not within the clauses of the act above referred to: a will of such customary lands is no creation or declaration of a trust, nor a grant or assignment of any trust; but the surrender and will together constitute a legal conveyance: there is no separation of the legal and equitable estate. The statute of frauds looked to no will of lands but such as should be executed and attested as thereby directed. And having prescribed the necessary forms for a devise of *lands* or tenements, it then proceeds to protect in like manner the grant, declaration, or assignment of the *trust* of any lands or tenements; evidently
[324] alluding to an *equitable* interest in lands; and the terms *will in writing*

writing and *such will or devise*, used in the 7th and 9th clauses, must refer to such will only as the statute recognizes as a will of land, viz. a will attested by three or four witnesses. We are therefore of opinion, that a will directing the uses of a surrender is not within any of the clauses of the statute of frauds.

And that reduces this case to the only remaining question, Whether the will stated in this case fall within the terms of the surrender? that is, whether it will be a will *in writing?* The statute of wills, 32 *H.* 8. *c.* 1. gave power to every person having lands, to dispose thereof by *will in writing*. Under this statute short notes taken by a lawyer from the testator's mouth, for the purpose of being reduced into form, were holden to be a good will in writing, though the testator died before they were so reduced into form. 1 *Anderson*, 34. Many other instances are mentioned by Lord *Coke*. So 3 *Leon*, 79. 2 *Keb.* 128. And every decision on the statute is an authority as to what in the language of the law is a will in writing. And in *Carey* v. *Askew*, 2 *Bro. Ch. Cas.* and in a note to *Wagstaff* v. *Wagstaff*, 2 *P. Wms.* 259., Lord *Kenyon*, when Master of the Rolls, sitting for the Chancellor, 9th *May* 1786, determined that a draft of a will, the signing and publication whereof were prevented by the sudden death of the testator, was sufficient to pass copyholds surrendered to the use of his will. The draft of the will on which that decision proceeded was produced to us at the time of the argument, and was as stated in the report in the note in 2 *P. Wms.* For these reasons we are of opinion, that the instrument in question is a will in writing within the terms of the surrender; and that judgment must be for the plaintiff.

Postea to the Plaintiff.

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Wednesday, Feb. 12th.

STEAD *against* GAMBLE.

Where to trespass at *A.*, and throwing down, burning, and totally destroying the plaintiff's *hedge, there then erected*, &c. whereby, &c. the defendant pleads the general issue, and justifies as to the throwing down the hedge, because it was erected on a common over which he prescribes for right of common; and issue is taken on such right, which is found for him, and a verdict for the plaintiff with 20*s.* damages on the general issue, the facts stated in the special plea and found cannot be taken into consideration to shew that the title to the freehold could not come in question on the declaration; and as on the declaration the freehold might have come in issue, and the Judge did not certify, the plaintiff is entitled to no more costs than damages.

IN trespass, the plaintiff declared that the defendant at *Leeds* &c. with force and arms threw down, pulled up, burnt, and consumed by fire, and totally destroyed 40 perches of hedge or fence of the plaintiff, there then erected, standing and being, whereby a certain close of land of the plaintiff's called *Longclose*, was exposed to damage by cattle, &c. and the wheat there then growing was damaged and destroyed by cattle, &c. Pleas, 1st, the general issue; 2dly, as to the pulling up, throwing down, and destroying the said hedge of the plaintiff, the defendant pleads that the said hedge was before then wrongfully erected and being upon a certain common, &c. over which the defendant prescribes for right of common in respect of a certain messuage, &c.; and that the hedge had been wrongfully erected on the said common, and inclosed that part from the rest, so that the defendant could not enjoy his said common as before; and so justifies the pulling up and throwing down the hedge, and thereby in some degree destroying the same, but doing as little damage as possible. The replication took issue on the defendant's right of common; which was found for the defendant, and there was a verdict for the plaintiff on the general issue, with 20*s.* damages. And the Judge not having certified, a rule was obtained calling on the defendant to shew cause why the Master should not tax the plaintiff his full costs.

Lambe shewed cause, and contended that the special plea not going to the whole trespass, being found for the * defendant, left the case as if the general issue only had been pleaded; and then, unless the Court could say that upon the face of the declaration it was impossible for the Judge to have certified that the title of the land was in question, the plaintiff is not entitled to full costs under the stat. 22 & 23 *Car.* 2. *c.* 29. *s.* 136., there being no certificate. And he cited 2 *Ventr.* 180. 195. as in point; where to trespass qu. cl. fr. not guilty was pleaded, and also a justification; the latter of which being found for the defendant,

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and a verdict for the plaintiff on the general issue with damages under 40*s.*, he was denied his full costs. (*a*) The same principle applies on the other branch of the statute, in trespass for an assault and battery; if the defendant plead the general issue, and a justification as to the assault only, which latter is found for him, and a verdict for the plaintiff for less than 40*s.* on the general issue, and no certificate, the plaintiff is entitled to no more costs than damages. (*b*) Otherwise if the battery as well as assault be justified, and a verdict for the plaintiff with damages under 40*s.* (*c*) Now here it is charged that the defendant threw down, &c. and burnt the plaintiff's hedge, *there then standing and being*, i. e. at *Leeds*, &c.; which was necessarily a local trespass, in which the freehold might have come in question. And as in *Adlem* v. *Grinaway*, (*d*) in trespass for throwing stones, &c. at the plaintiff's windows of his house and breaking the glass, &c. the damages being under 40*s.* and no certificate, the plaintiff had no more costs than damages, because the defendant might have given liberum tenementum in evidence, and so the title to the house have come in question: so here the defendant might have shewn that the fence thrown down was his own fence on his own land. [327]

Hullock, contrà. According to the construction put upon the stat. 22 & 23 *Car.* 2. if it either appear that the Judge could not have certified, or that upon the face of the pleadings the title could not have come in issue, the case is not within it, and the plaintiff is entitled to full costs, though the verdict be under 40*s.*, and the Judge do not certify. Now upon these pleadings the title could not have come in question, as it might if only the general issue had been pleaded; for then the defendant might have proved that it was his fence. But by the special plea the defendant alleges that the fence was wrongfully erected on a common upon which he had a right of common; and the issue being joined on his right of common it stood confessed upon the record that the fence was erected on the common; and though if he had a right of common he might justify the throwing it down to enjoy his right, yet he could not justify the total destruction and burning of it, which therefore stood

(*a*) All the cases are collected in *Hullock on Costs*, 61, &c.
(*b*) *Page* v. *Creed*, 3 *Term Rep.* 391.
(*c*) *Smith* v. *Edge*, 6 *Term Rep.* 562.
(*d*) 6 *Term Rep.* 231.

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upon the general issue. The whole record must be taken together: and the special plea negatives any claim of the defendant to the soil, so that the title to the soil could not come in question, and the defendant as commoner could not meddle with the soil, according to *Mason* v. *Cæsar*, (*a*) *Cooper* v. *Marshall*, (*b*) and *Sadgrove* v. *Kirby*. (*c*) Then if this be not a case within the stat. 22 & 23 *Car.* 2., there not having been a certificate against costs under the statute 43 *Eliz. c.* 6. *s.* 2. the
[328] plaintiff is entitled to his full costs under the statute of *Gloucester*, according to *Milburne* v. *Read*. (*d*)

The Court said they would look into the cases; and now Lord ELLENBOROUGH C. J. delivered their opinion.

The question arises on the statute 22 & 23 *Car.* 2. *c.* 9. which says that "in all actions of *trespass*, assault and battery, "and other personal actions wherein the Judge at the trial "shall not certify, &c. that the freehold or title of the land "mentioned in the plaintiff's declaration was chiefly in ques- "tion, the plaintiff, in case the jury shall find the damages "under 40*s.* shall not recover more costs," &c. Here the *declaration* states, that the defendant, at such a place, with force and arms threw down, pulled up, and destroyed 40 perches of hedge or fence of the plaintiff, *there erected*, standing and being, whereby, &c. And the construction on this statute has been that it relates only to the two species of action therein specially named, (*e*) of *trespass*, and *assault and battery*; and that the action of *trespass* is confined to *trespass quare clausum fregit* wherein the freehold or title of the land may come in question: (*f*) And the question here is, Whether this be such an action in which the freehold or title could come in question; for if it might, the damages being under 40*s.* and the Judge not having certified, the plaintiff can have no more costs than damages? But in this case there was, besides the general issue, a special plea justifying the prostration of the hedge, because it was wrongfully erected upon the defendant's common, and debarred him of the exercise of his right of common in tam amplo modo; on which right of common issue was
[329] taken and found for the defendant: and it was contended that

(*a*) 2 *Mod.* 65. (*b*) 1 *Burr.* 265. (*c*) 6 *Term Rep.* 123.
(*d*) 3 *Wils.* 322. 4. (*e*) Vide *Hullock on Costs*, 11.
(*f*) Ib. 65, &c.

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we ought to take into consideration the facts stated in that plea and the finding of the jury thereon, in order to shew that the plaintiff's freehold could not come in question. But we are of opinion that we cannot for this purpose look to the facts stated in the plea: and therefore the inquiry reverts back to the *declaration*, upon which we think that the freehold might have come in question: and that as the damages are under 40*s.*, and there is no certificate of the Judge that the freehold did come in question, the plaintiff cannot have more costs than damages. Amongst other cases which are collected in Mr. *Hullock*'s book upon this subject will be found *Butler* v. *Cozens*, 11 *Mod.* 198. and 6. *Vin. Abr.* 357. in the margin; where in trespass for breaking the plaintiff's *lock upon his gate*, the damages being under 40*s.* and no certificate, it was holden that the plaintiff should not have full costs; for the lock was fixed to the post, and the post to the freehold, and therefore the freehold might have come in question. In another case, of *Tomlinson* v. *White*, *Barnes*, 121, in trespass for breaking and entering his the plaintiff's house, and breaking his cellar door; the jury having found for the plaintiff as to the breaking the door 6*d.* damages, and their being no certificate, the plaintiff had only so much costs, because the door was fixed to the freehold, which might therefore have come in question. Again, in *Comb.* 420. in trespass for pulling down a hedge, whereby the cattle of strangers entered and eat the grass; where the hedge must be taken to have been fixed to the freehold; the plaintiff had no more costs than damages. And in *Hains* v. *Hughes*, in the same book, p. 324. in trespass for entering the plaintiff's close and cutting his cable, whereby he lost the use of his boat, the plaintiff having 2*d.* damages, had his full costs: but *Holt* [330] said it would have been otherwise in an action for breaking his close and cutting his rails, *for they are fixed to the freehold*. Now this must be considered as an action of trespass quare clausum fregit, and destroying and burning the plaintiff's hedge, which was part of the freehold, in which the freehold might have come in question; and the damages being under 40*s.* and no certificate, there can be no more costs than damages.

Rule discharged. (*a*)

(*a*) Vide *Martin* v. *Wallace*, 1 *East*, 550.

LINE

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Wednesday, Feb. 12th.

LINE *against* LOWE.

A defendant superseded for want of being charged in execution within two terms *after* judgment cannot be again arrested and taken in execution upon the same judgment: aliter, if superseded for want of proceedings in time *before* judgment.

THE Defendant, who was in custody on mesne process, having been superseded for want of being charged in execution within two terms after final judgment, was afterwards taken in execution upon a writ of capias ad satisfaciendum issued upon the same judgment; whereupon a rule nisi was obtained for setting aside the writ, and discharging the defendant out of custody, for irregularity, with costs; on the ground that the body of the defendant, having been once discharged out of custody for want of being charged in execution in due time *after* final judgment, could not be taken again upon the same judgment; which was said to have been so ruled in *Wright* v. *Kerswill*, (*a*) and recognised in *Blandford* v. *Foot*.(*b*)

* [331] * *Wood* shewed cause, and said that this was a mere dictum in the case in *Barnes*, which was repeated in the other case, but was not the point in judgment in either case: for in the first, the defendant, who had been discharged out of custody on entering a common appearance for want of the Plaintiff's proceeding to judgment in due time, was taken and holden in execution after judgment in the same cause: and in the last case the defendant was holden liable to be taken in execution in an action on the former judgment, *having never been charged in execution before*, though he could not be holden to special bail in such action. Then as the defendant would have been liable to have been taken in execution in an action brought upon the judgment, it is more beneficial to him to be charged in execution on the same judgment, without the accumulation of the costs in the second action.

Wigley, in support of the rule, relied upon the distinction laid down in the books, that if the defendant be discharged out of custody *before* judgment, there he may be taken in execution after judgment: aliter if superseded *after* judgment: for which he referred particularly to *Impey's Instr. Cler.*, (*c*) who refers to a note on the Rule of *T.* 2 *Geo.* 1., and this is supported by the cases before mentioned, and by *Rose* v. *Christfield*, (*d*) where the gene-

(*a*) *Barnes*, 376.

(*b*) *Comp.* 72. and vide *Topping* v. *Ryan*, 1 *Term Rep.* 273.

(*c*) *K. B.* 4th edit. p. 525. (*d*) 1 *Term Rep.* 591.

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rality of the rule once contended for, that a prisoner once supersedable always continues so, was qualified and restricted to cases where he remains in the same custody and under the same process.

Lord ELLENBOROUGH C. J. said that the Court would inquire into the practice; and the next day his Lordship said that upon looking into the book of Rules and Orders of *K. B.* there was a reference from the rule of *T.* 2 *Geo.* 1. (*a*) to a note which struck their notice, stating that if the defendant supersede for want of proceedings before judgment, yet the plaintiff may, after judgment obtained, take the defendant in execution: *but otherwise if the defendant supersede for want of charging in execution;* (*b*) but no authority was quoted in support of it. That they had, however, found an express authority for it in *Clarke* v. *Venner, M.* 10 *Geo.* 2. reported by Sir *George Cooke* in his *Cases of Practice in C. B.* p. 136. "A motion to discharge the defendant out of execution, who was before discharged for want of the plaintiff's proceeding to judgment; afterwards the plaintiff proceeded to judgment and took the defendant in execution. Mr. Justice *Denton* said he had consulted with *the Justices of the King's Bench,* and one of the Judges told him that *the constant practice of that Court was,* that where a defendant was discharged for want of proceeding to judgment, the plaintiff may afterwards proceed to judgment, and take him in execution thereon. *But if the plaintiff had proceeded to judgment, and the defendant was discharged for want of being charged in execution, he should be totally discharged,* and cannot after that be *charged in execution.*" The same thing is said in *Blandford* v. *Foot,* which refers to *Wright* v. *Kerswill.* We are therefore of opinion, upon the authority of these cases, that the defendant, having been superseded for want of being charged in execution in due time after judgment, cannot now be taken again in execution upon the same judgment.

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Rule absolute.

(*a*) There is no paging to the edition of 1717, but it is p. 210 of edit. of 1795. The quotation here made is from the former edition.

(*b*) There is no reference to any authority in the original edition: but a corresponding note in the edition of 1795, p. 300. refers to *Hall* v. *Howes, Cas. temp. Hardw.* 244. which does not go fully to the point in question.

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Wednesday, Feb. 12th.

DALE, Qui Tam *against* BEER.

It is sufficient in a *qui tam* action to entitle the plea with the names of the parties, without the addition of qui tam, &c. to the plaintiff's name.

THE Plaintiff sued in debt, as well for himself as for the poor of the parish of *West Moulsey* in *Surrey*, to recover certain penalties upon the stat. 13 *Geo.* 2. *c.* 19. for entering a running poney. The Defendant put in a plea of nil debet, intitled, "*Walter Beer* at the suit of *Thomas Dale*." On which the plaintiff signed judgment as for want of a plea, on the ground that the plea was improperly entitled, this being a *qui tam* action, wherein the plea should have been entitled, *Dale qui tam*, &c.: and now, upon a rule for setting aside the judgment for irregularity with costs, which was supported by *Reader*, and opposed by *Lawes*,

The Court were of opinion that the judgment was irregularly signed; that the plea was well enough entitled, without the addition of the character in which the plaintiff sued: and made the

Rule absolute.

MEMORANDA.

AT the latter end of this Term Lord ELDON resigned the Great Seal, and was succeeded in the office of Lord High Chancellor, by the Honourable THOMAS ERSKINE, who was created a Peer of the United Kingdom of *Great Britain* and *Ireland* by the title of Lord ERSKINE, Baron of *Restormel Castle*, in the county of *Cornwall*; and was afterwards sworn of His Majesty's Most Honourable Privy Council. His Lordship took his seat on the Bench of the Court of Chancery on the last Day of Term.

ARTHUR PIGGOTT, Esq. one of His Majesty's Counsel learned in the law, succeeded the Honorable SPENCER PERCEVAL as His Majesty's Attorney-General; and was knighted.

SAMUEL ROMILLY, Esq. one of His Majesty's Counsel learned in the law, succeeded Sir VICARY GIBBS, Knt. as His Majesty's Solicitor-General; and was knighted.

THOMAS JERVIS, Esq. was appointed one of His Majesty's Counsel learned in the law.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Easter Term,

In the Forty-sixth Year of the Reign of GEORGE III.

Mr. Serjeant *Lens* and Mr. Serjeant *Best*, having been appointed His Majesty's Serjeants learned in the Law, took their Seats within the Bar at the beginning of this Term: as did also *Francis Hargrave*, Esq. on being appointed one of His Majesty's Counsel learned in the Law, and *Philip Dauncey*, Esq. on having a Patent of Precedence.

TURNER *against* RICHARDSON and Another, Assignees of BARBER, a Bankrupt

Thursday, April 24th.

Where assignees of a bankrupt advertised the lease of certain premises, of which the bankrupt was lessee, for sale by auction, (without stating themselves to be the owners or possessed thereof) and no bidder offering, they never took possession in fact of the premises: held, that this was no more than an experiment to ascertain the value, whether the lease were beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term, or support an averment in a declaration in covenant against them by the landlord, that all the estate, right, title, interest, &c. of the bankrupt in the premises *came to the defendants by assignment thereof.*

THE Plaintiff declared in covenant as assignee of the residue of a term of 40 years and a half, holden under the crown, in certain premises upon an indenture of * demise thereof, dated 1st *January* 1789, made by a prior termor, through whom

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TURNER *against* RICHARDSON.

he claimed, to *Barber* the bankrupt, for 34 years from the ensuing *Lammas*, at the yearly rent of 132*l.* payable at *Candlemas* and *Lammas*, by virtue of which indenture *Barber* entered and was possessed. The declaration then stated, that after *Barber* became so possessed of the premises, viz. on the 1st of *January* 1790, *all his estate, right, title, interest, and term therein came to the Defendants by assignment thereof duly made*, by virtue of which said *assignment the defendants entered into the demised premises and were possessed thereof* for the residue of the term, &c. and assigned for breaches an arrear of rent for three years, ending on *Lammas* day 1804, to the amount of 396*l.* 18*s.* which the defendants refused to pay; and want of repair during the possession of the defendants. The defendants pleaded, 1st, that all the estate, right, title, interest and term of *Barber* on the premises, *did not come to them by assignment thereof.* 2d, That the defendants *did not enter* into the demised premises. 3d, That the defendants *were not possessed* thereof for the residue of the term. 4th, That *Barber*, being a trader, and indebted, &c. became a bankrupt, &c. and that his personal estate and effects were assigned and transferred by the commissioners to the defendants in trust for his creditors; but that the estate, right, title, interest, and term of *Barber* in the demised premises, was not specified in the indenture and assignment from the commissioners to the defendants as assignees as aforesaid, *and never came to the defendants by assignment thereof*, except to the assignees of the estate and effects in general terms of *Barber* the bankrupt; and that the defendants *have not at any time hitherto taken possession of the demised premises.* There was a 5th plea similar to the last, only stating in
[337] the conclusion that the defendants *had not* at any time hitherto *entered into the demised premises;* and a 6th similar plea, alleging that the defendants *had not* at any time *hitherto consented or agreed to accept* the estate, right, title, interest, and term of *Barber* of and in the demised premises, *as part of his estate and effects;* and a 7th similar plea, alleging that the defendants had *renounced* the estate, &c. and term of *Barber*, of and in the demised premises from being to be considered as part of his estate and effects. Issues were taken on the three first pleas; and the plaintiff replied to the 4th, that the defendants did take possession of the premises; to the 5th that they did enter; to the 6th, that they did agree to accept the estate of *Barber;* and to the 7th,

7th, that before they renounced, they accepted and were possessed of the residue of *Barber's* term. The rejoinder took issue on the replications to the 4th, 5th, and 6th pleas; and to the replication to the 7th plea, the defendants rejoined that they did not accept, nor were possessed of, the residue of the term before they renounced; and on that also issue was taken.

At the trial before *Chambre* J. at the last assizes at *Newcastle*, Mr. *Fenwick*, the only witness, proved that he was employed as an attorney by the defendant in 1796, and by whose direction he advertised the premises in question for sale. That there was a demand of about 500*l.* by the plaintiff, the landlord, on *Barber*, for the rent in arrear, and for the repairs of the property in question, which had been several times demanded; on which account Mr. *Fenwick* advised the defendants to advertise the property for sale, in order to try whether it were of any or what value, and whether it would countervail the charges upon it; and if it would produce sufficient to pay the landlord; his demand being the principal object, as the other debts were mostly [338] satisfied. Accordingly a sale was advertised (*a*) which was attended by Mr. *Fenwick* in company with *Richardson*, one of the assignees of *Barber*, and the property was put up in different lots to induce persons to bid; but there was no bidder. *Richardson* said, that an offer had been made for a meeting-house (the principal part of the premises); but the offer was so small that Mr. *Fenwick* advised him not to accept it, as it would do nothing to liquidate the plaintiff's demand; and nothing was in fact ever received by the assignees for it. After this Mr. *Fenwick* advised a valuation of the premises, but being informed that they were worth nothing, he advised the defend-

(*a*) The advertisement was in these terms: "To be sold by public auction, at the house of *H. B.*, *Pigmarket*, *Newcastle-upon-Tyne*, on *Monday* 19th *Dec.* 1796, subject to such conditions of sale as shall then be produced, all those several messuages or dwelling-houses, one of them late the *Blue Bell* public house, and ten shops, and also the Protestant Dissenting Meeting-house, Parsonage-house, School-room, waste ground, and premises, held by lease for 34 years and a half from *Lammas* 1789, under Sir *J. C. Turner* Knt., situate in or near the *Castle Garth*, &c., let to different tenants at upwards of 200*l.* per annum. The respective tenants, on application, will shew the premises, and further particulars may be known by applying at the office of Messrs. *Fenwick*, *Newgate-street*, *Newcastle*."

ants,

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ants, his clients, not to interfere with the property. Upon this evidence the learned Judge thought, as the defendants did not appear to have taken possession, either actually or by receiving any rent, or to have ever paid rent either to Sir *J. Turner* or to the plaintiff who claimed from him, that the single circumstance of endeavouring in the year 1796 to ascertain the value of the premises by the means stated by the witness, and which appeared to have been done for the purpose of determining whether it were advisable for them on the part of the creditors to accept the estate or not, was not sufficient to affix upon the
[339] defendants the character of assignees of *Barber*, the bankrupt's term, so as to render them responsible for the performance of the covenants in his lease: on which the plaintiff submitted to be nonsuited. In last *Michaelmas* term a rule nisi was obtained for setting aside the nonsuit, &c. on the ground that the assignees, by putting the premises up to sale, had taken to and treated them as their own, and could not afterwards renounce them because the bargain proved disadvantageous. And a case of *Broome* v. *Robinson*, tried before Lord *Kenyon* C. J. at *Westminster*, in *December* 1800, was cited; where the plaintiff, the landlord of a house, brought his action for use and occupation from *Lady-day* to *Michaelmas* 1800, against the defendant, who was the assignee of a bankrupt to whom the house had been let. After the bankruptcy, in *January* 1800, the plaintiff applied to the defendant to know if he meant to take the bankrupt's interest in the house; to which the defendant answered, that if he did not let it by *Lady-day*, he would give it up; and at *Lady-day* the defendant paid the rent, and offered the agent the key. It was contended that the defendant, as assignee, was not liable. But Lord *Kenyon* C. J. held, that though he might have refused it at first, yet he could not take it in part, and afterwards reject it when he found it would not answer, and he could not let it. And the plaintiff recovered.

Park and *Littledale* now shewed cause, and distinguished this from the case last cited; for there the assignee had refused at first to deliver up the premises when put to his election by the landlord. And they referred to *Bourdillon* v. *Dalton* and others (*a*) where Lord *Kenyon* considered that the assignees of a bankrupt lessee were not liable for the rent, unless they had

(*a*) *Peake's N. P. Cas.* 233; and 1 *Esp. N. P. Cas.* 238.

taken

taken possession of the premises. And in *Eaton* v. *Jacques*, (*a*) *Buller* J. said that not even an absolute assignment was sufficient to charge an assignee without possession. Now here the assignees never took to the term, or ever had possession, either actual or implied, as by the receipt of rent. They only endeavoured to ascertain the value by advertising the premises for sale, as it was their duty to do, the result of which determined them not to take to the lease. [Lord *Ellenborough* C. J. before the advertisement for sale was produced, inquired whether the defendants had therein held themselves out as the owners of the lease; which, it was suggested, might have been evidence to go to the jury: but upon the production of the advertisement as before stated, nothing of that sort appeared. And as there was no bidding at the sale, no question arose as to the auction duty, as in the case of property bought in by the owner.]

Cockell Serjt. and *Richardson*, in support of the rule, contended, that the assignees taking upon themselves the power of disposing of the premises, by putting them up to sale, was tantamount to an actual possession; and precluded them from saying that they had not taken to the lease; for unless they had, they could have no power of selling it. The landlord might not have chosen to have the premises put up to auction, if they were to be thrown back upon his hands. [Lord *Ellenborough*. All that does not vest in the assignees must remain in the bankrupt.] Notwithstanding the doctrine laid down in *Eaton* v. *Jacques*, (which has often since been disputed,) (*b*) it is sufficient [341] that there has been an actual assignment in order to charge the assignee, without an actual entry. But particularly in the case of assignees of a bankrupt, in whom the law vests the property of the bankrupt; though they may renounce that which is not beneficial. But they cannot make such renunciation after they have once assented to take the interest devolved upon them:

(*a*) *Dougl.* 461.

(*b*) They referred to *Walker* v. *Rees*, *Dougl.* 461. v. *Stone* v. *Evans*, Sittings after *Mich.* 39 *G.* 3., where the question was, Whether the assignee were liable to the ground rent; and Lord *Kenyon* said he could not subscribe to the doctrine laid down in *Eaton* v. *Jacques*. And *vide* what was said by the same noble and learned Judge in *Westerdell* v. *Dale*, 7 Term Rep. 312.

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and no stronger instance of such assent can be given, than holding themselves out to the world as having power to sell it; for no sale of property can take place but by the owner of it; and it is merely giving the transaction a colour to say, that it was only an experiment to ascertain the value. At all events it was evidence for the jury. [*Le Blanc* J. observed, that when the Judge gives his opinion upon the evidence, and the plaintiff submits to be nonsuited rather than risk a verdict with that direction, he cannot afterwards object that any fact has been withdrawn from the consideration of the jury.] To which they said, that they had submitted in deference to the opinion expressed by the learned Judge, of the law arising out of the facts in proof.

Lord ELLENBOROUGH C. J. This is an action brought by the landlord of certain premises against the assignees of a bankrupt lessee, charging them with the breach of covenants, which, if they were assignees of the land, they would be liable to; and in this action it is necessary, according to the usual form of
[342] declaring which has been pursued, to charge that the premises had come to the defendants *by assignment*, that by virtue thereof they had *entered* into and were *possessed* of the premises for the residue of the term; and upon all these facts issues are taken. There was no proof of any actual entry or possession by the defendants, and therefore the question comes to be raised upon the other issue, whether all the estate, right, title, interest, and term, of the bankrupt in the premises, *came to the defendants by assignment* thereof duly made? Now it has been decided that assignees of a bankrupt are not bound to take what Lord *Kenyon* called (*a*) a damnosa hæreditas; property of the bankrupt, which so far from being valuable would be a charge to the creditors; but they may make their election: if, however, they do elect to take to the property, they cannot afterwards renounce it because it turns out to be a bad bargain; according to what Lord *Kenyon* said in the other case of *Broom* v. *Robinson*. What then is the evidence, on which this issue is endeavoured to be sustained? It appears that the assignees, being anxious to know whether it were worth their while to take to the premises for the benefit of the creditors, made an experiment to ascertain their value. If the property were valuable to the

(*a*) In *Bourdillon* v. *Dalton and Others*, ante, 339.

bank-

bankrupt's estate they would have been guilty of a breach of duty to the creditors in abandoning it; and therefore it was their duty by making such experiment to ascertain that fact. For this purpose they published an advertisement, in which they did not state that the premises belonged to them; they do not even state for or by whom they are to be sold, but only generally that there is a saleable term. If a bidder had been found, and they had accepted the bidding, then that would have been evidence of their assent to take to the premises. But no bidder offered himself. They therefore kept it in suspence to the time when the bidding was to be made whether they would take to the term or not; intending, if a bidder offered whom they thought it worth their while to accept, they would take to it. No such opportunity occurred, and therefore there was no assent on their part to take to it.

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GROSE J. The question is, as my Lord has stated it, whether the premises came to the defendants by assignment, that is, whether they were *possessed* by the defendants *as assignees* of the term? The defendants stood in a different situation from persons in general. They were assignees of a bankrupt's estate for the benefit of his creditors: and they were to consider whether it were for the benefit of the creditors that they should take to this property or wave it. On the one hand, if they entered and were possessed, they became liable to be sued upon the bankrupt's covenants for rent and non-repair, which might amount to more than the value of the lease; on the other hand, if the lease were valuable, and they did not take to it, the creditors would have had a right to call upon them for neglect of their duty. In order therefore to ascertain the fact of the value they advertised the property for sale, without stating, however, that it was in their possession; it was no more than making an experiment to ascertain whether the property were of any and what value. There were no bidders: it therefore turned out to be of no value to the defendants as assignees of the bankrupt's estate, and consequently they did not take possession of it. The most which could have been left to the jury was, whether the defendants were in fact *possessed* of the premises: and it is plain from the evidence that finding they were of no value they never did enter into possession; and in the true sense of the issue

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issue, the defendants were not assenting to the assignment of these premises to them.

LAWRENCE J. It is admitted that some *assent* of the defendants to the assignment to them of the premises is necessary in order to charge them with the bankrupt's covenants: and the question is, Whether there were any evidence of such assent? It is said that there was, because they held themselves out to the world as the *owners* of the property which they were willing to sell: but the act which they did does not amount to that: they did not by the advertisement engage that they were then the owners; but only that if any person would become a buyer they would do that which would make a good title to it. Therefore if the question had gone to the jury, there was not sufficient evidence for them to find that the defendants had taken to the lease. The advertising for sale was a mere experiment to enable them to judge whether the lease were worth their taking; the result proved that it was not; and therefore they did not assent to the assignment of it to them, which assent is admitted to be necessary in order to bind them.

LE BLANC J. The houses were in lease at the time, and therefore the assignees were not in the actual possession of them, and they never acquired a virtual possession by the receipt of the rents. Then when the law says, that assignees of a bankrupt may take to the bankrupt's property or not according as it is or is not beneficial to the creditors, the same law, in order to be consistent, must also say that they may do those previous
[345] acts which are necessary to ascertain whether the property be beneficial or not before they take to it. Then having done that in the present case which was the best way of ascertaining whether the lease of these premises were beneficial or not by putting it up to auction, and not having disposed of it, we cannot say that they have taken to it as assignees of the term. It might as well be said to be a taking to the interest of the bankrupt in the premises if they had sent a surveyor to ascertain what the value of the property was.

Rule discharged.

THE

The KING *against* The Bishop of OXFORD.

Thursday, April 24th.

A Writ of mandamus issued in *Michaelmas* term last to the bishop; which, reciting that the Rev. *Isaac Knipe*, clerk, *had been* DULY *nominated and appointed by the inhabitants of the township of Piddington*, in the parish of *Ambrosden*, in the county of *Oxford*, or the major part of them, *to be chaplain or curate of the church or chapel of Piddington*; and that by virtue of such nomination and appointment he ought to be *licensed* by the bishop to officiate as chaplain, &c. and to enjoy all the privileges and profits belonging to the said place and office of chaplain. And that after such his nomination and appointment he did in due manner request the bishop to grant him his licence; yet that the bishop, well knowing the premises, &c. refused, without reasonable cause, to license the said *J. K.* &c. to the damage and grievance of the said *J. K.* as also of the inhabitants of the said township; therefore commanded the bishop to grant the said licence. Whereupon * a rule was obtained in the last term, calling upon the prosecutor to shew cause why the writ should not be quashed for the insufficiency thereof apparent upon the face of it; inasmuch as it neither suggests a custom for the inhabitants to elect a chaplain who was entitled to the use of the pulpit without the consent of the rector, nor the consent of the rector in case there be no such custom; without one or other of which the mandamus would be against common right and nugatory.

In a writ of mandamus such facts should be alleged as are necessary to shew that the party applying for it is entitled to the relief prayed. Therefore where a mandamus to the ordinary to license a curate only stated that he had been *duly nominated and appointed by the inhabitants* of a township to be curate of the church of *P.*, without stating either the consent of the rector or any endowment or custom for the inhabitants to make such nomination and appointment, the Court quashed the writ.

Mills and *Manley* now shewed cause against the rule. It is sufficient upon the face of this prerogative writ to state generally the right of the party applying; but though any thing be omitted which ought to have been suggested, in order to entitle the party to what he prays, that, according to Lord *Holt*, in *Peat's* case, (*a*) will be *good matter to return*. That the party was *dubito modo electus* is all that is stated in a mandamus to a corporation to admit and swear in a corporator. So the mandamus to the dean and chapter of *Exeter*, (*b*) to admit and swear in one *Volland* to the office of one of the eight men of the parish

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(*a*) 6 *Mod.* 310. (*b*) *Trem. P. C.* 467.

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of *Ashburton* in the county of *Devon*, merely states that he was *duly elected* into the office: and the circumstances which went to shew that he was not duly elected were stated by way of answer in the return. So a mandamus to the dean and chapter of *Dublin*, (*a*) to admit one to a stall in the choir, and a voice in the chapter, only recites that the party had been legally instituted and inducted to his stall and voice, which the dean and chapter had refused him: and they in their return state the
[347] cause of that refusal. And in *Rex* v. *Ward*, (*b*) where one of the objections taken to the writ (being a mandamus to the defendant to admit and swear in *H. D.* to be deputy registrar of the archbishop of *York's* Court) was that it was not averred in the writ that the defendant was the person bound to admit and swear in the deputy registrar; the answer given, which the Court appears from the report to have thought sufficient, was, that if Dr. *Ward* were not the person to whom the executing the writ belonged, he should have returned so. (*c*) They admitted

(*a*) 1 *Stra.* 536. *and* 8 *Mod.* 27.

(*b*) 2 *Stra.* 893. *Fitzg.* 123. and 1 *Barnard*, 252. 294. The writ in this case was directed to the defendant *as commissary of the province of York*. *Ford's* MS.

(*c*) This was not the true answer which the Court gave to that objection; for it appears from Mr. *Ford's* MS. (the best reports of that period, for the use of which I am much indebted to Mr. *R. Ford* his son) that *Filmer* objected that it was suggested in the writ that the commissary was bound to admit by his office, which he said was a usual clause in all writs of this nature, and that it was void unless it appeared that the person to whom it was directed was obliged by his office to do the thing commanded in the writ. To this point see *Trem. Entr.* 452, 3, 4. 461. And it was said that no return, but that he was the proper officer, would make the writ good; for nothing shall be taken by inference to support a bad writ: for, were that allowable, much less would be requisite whereon to found a peremptory mandamus than an original one; on which, he said, the Court always required an affidavit that the person to whom the writ was prayed was the proper officer to execute it, and that he had refused to do the act, which the Court might compel him to do by the writ: facts which he argued ought to be inserted in the writ. To which it was answered by *Strange*, that though the writ does not expressly say that Dr. *Ward* is the proper person to swear in Mr. *Dryden*, yet it speaks what amounts to a literal affirmation: for it recites that application had been made to him to swear in Mr. *Dryden*, and that he *minus juste* had refused it; an expression very absurd, unless he were the

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mitted that since the cases of *Rex* v. *The Bishop of London*, (*a*) *Rex* v. *Field*, (*b*) and *Rex* v. *The Bishop of Exeter*, (*c*) the Court would not grant a mandamus to the ordinary to license a lecturer or chaplain to use the rector's pulpit, unless the consent of the rector were shewn, or a custom in the inhabitants to elect without such consent; but they contended that it was sufficient if such a custom were shewn by affidavits, as it was in this case, founded on a deed in 1428; and not denied by any counter affidavits; and it was not necessary to be stated in the writ itself. [*Lawrence* J. If the inhabitants can only nominate the curate by a custom, how can the Ordinary negative that in his return, if the custom be not stated in the mandamus? Lord *Ellenborough* C. J. It will be said in answer to a writ so framed as this is, that the inhabitants may have nominated the curate, but non liquet that the bishop is bound to license him; for the only effect of such a nomination is to give the party a ground for asking the rector's consent, without which the bishop cannot license him. Then should not such consent be stated in the writ calling upon the bishop to grant such license?] There is no instance of a mandamus being quashed for only stating [349]

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the officer for that purpose: as was another allegation in the same writ, viz. that his refusal was *in contemptum domini regis*. Besides, the mandatory part of the writ being in the disjunctive, either that Dr. *Ward* should swear in *Dryden*, or shew good cause to the contrary, (as that he was not the proper person would have been;) his returning another excuse for not obeying the writ is a plain indication that he is the proper person to do this act. He said that there were many writs without this averment; and particularly that between the *King* and *Clapham*, 1 *Ventr.* 110. as appears by the record, (of which he said that he had a copy.) The case of *The King* v. *Ipswich* was mentioned, where a writ was directed to that corporation by a wrong name, and a return made by the corporation in their right one; and *Filmer* argued that if the return in that case would not make the mandamus good, how can it do it in this?

Curia. We think the particulars before noted in the writ, and the matter contained in the return do sufficiently ascertain Dr. *Ward* to be the proper person to swear in *Dryden*, &c.

(*a*) 1 *Term Rep.* 331. (*b*) 1 *Term Rep.* 125. (*c*) 2 *Vent.* 307.

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that the party was debito modo electus. The frame of the writ is as general as a declaration in an action on the case, the strictness of which has been much relaxed; as in actions for not grinding corn at an ancient mill, for toll, for a way, &c. it is sufficient to declare upon the plaintiff's possession of the mill, or the toll, or the way, without setting out by what title he was possessed. [*Lawrence* J. I do not see the analogy between those cases and this, for a person may acquire rights from his possession: but here the nominee is not in possession, but is seeking to acquire it. The difficulty is for the ordinary to deny in his return the existence of a custom which is not alleged in the writ, to which such return is an answer. Where a mandamus issues to a corporation, to admit one to his freedom, who claims it in right of having served an apprenticeship to a corporator, is it not always necessary to state in the writ, that by charter or prescription such persons were entitled to their freedom? Lord *Ellenborough* C. J. The writ assumes that nothing more is wanted to perfect the party's right to a licence from the bishop than the nomination and election of the inhabitants; whereas something else is required, either the consent of the rector, or a custom which supersedes the necessity of such consent.] The objection would apply to all cases where the writ states generally that the party was debito modo electus. (*a*)

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Sir *V. Gibbs* and *Abbott*, in support of the rule, observed upon the precedent cited from *Trem.* 467. that it appears by the report of the case in *Shower*, (*b*) that the generality of that mandamus made it defective, and that a special mandamus was directed, which is to be found in the next page of *Tremaine*, wherein the custom is set forth. The distinction is this; where the facts stated in the writ are sufficient, if not denied, to entitle the party to have what he claims, there it is no objection that they are stated generally: as if a mandamus to swear in one who has been elected freeman of a corporation state that the party was *duly elected* a freeman of the corporation, and

(*a*) *Precedents in Tremaine*, 450 and 495 were referred to, the one for admitting a mayor of a borough, the other for restoring a fellow of the college of physicians; but in both these the party is stated to have been debite electus *secundum consuetudines*, &c.

(*b*) *Show.* 259.

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ought to be sworn in; as, if these facts be true, he ought to be sworn in, that general mode of stating his right is sufficient. But where it may be answered that admitting all the facts stated to be true, yet that the party is not therefore entitled to what he asks, that is an objection to the writ itself. In this case the real question between the parties cannot be raised by the denial of any fact stated in the writ: for admitting Mr. *Knipe* to have been duly elected and nominated by the inhabitants to be curate, it does not follow that he has a right to officiate without the consent of the rector; which is not stated, nor any immemorial endowment or custom stated from which such consent is necessary to be implied; and clearly the common law does not give him such a right. Where the common law casts a right upon the party duly elected by certain persons to an office, there it is sufficient to state his right by such election generally; but if he claim against common right, he must shew how. This distinction is pointed out by the difference of the precedents in the books. Therefore in *Needham's* case, (*a*) which was a mandamus to the archdeacon of *Norwich* to admit and swear *Needham* into the office of churchwarden, as the [351
parishioners, by whose election he claimed, could only have a right to elect a churchwarden by custom, such custom is stated upon the face of the writ. If this were a declaration in an action on the case against the bishop for refusing to license, it would be demurrable for the same reason that this writ is bad; for though the plaintiff may recover if a sufficient title in him appear to the Court, though it be defectively stated, yet a defective title cannot be aided by any intendment. They also referred to *Harris*'s case, *Trem.* 471. *Dunkin*'s case, ib. 501. and *Baker* v. *Baker*, ib. 505. as instances, amongst others, of special writs of mandamus, disclosing all the circumstances on which the aid of the several writs was prayed; and particularly to *Rex* v. *The Justices of the W. R. of Yorkshire*, (*b*) where a writ of mandamus to them, to make an order for the payment out of the county rates of the fees of the coroner for a peculiar liberty, was quashed, because the writ omitted to state that that liberty contributed to the county rates. And Lord *Kenyon* said, that "the prosecutor should have alleged in the writ all those facts which were necessary to shew that he was entitled to

(*a*) *Trem.* 469. (*b*) 7 *Term Rep.* 52.

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the relief prayed, and that he had a right to call upon the magistrates to do that, for the non-performance of which he sued out this compulsory writ.

Lord ELLENBOROUGH C. J. The bishop is required by this writ to do an act, which he is alleged to have refused doing in breach of his duty. The writ then should state those facts which constituted his duty, and induced an obligation upon
[352] him in point of law to do the act required. But here it only states that *J. Knipe*, clerk, had been duly *nominated and appointed by the inhabitants* of the township to be curate of the church, and that by virtue of *such nomination and appointment* he ought to be licensed; but it states no consent of the rector, nor any endowment or custom which might entitle the party to the use of the church in virtue of such mere nomination of the inhabitants. In the absence then of every foundation of this sort can it be said to state even a primâ facie title to call upon the bishop to grant his licence? It is the well known law of the land, recognised in the cases referred to, that the rector has the exclusive right to the use of his pulpit, without some custom, or some other competent agreement with him, to induce a right in some other to interfere with that exclusive right. Nothing is here stated but the nomination and appointment of the curate by the inhabitants; but it does not follow from thence that the consent of the rector is superseded; the writ should have gone on to state either the consent of the rector for the time being, or something which supersedes the necessity of such consent. As to the precedents referred to, where debito modo electus has been deemed sufficient to found the party's claim to be admitted and sworn in a member of a corporation: if there has been a due election of him, it follows that he is entitled to be admitted and sworn in. So in declaring in case for a right of way appurtenant to a house, it is a sufficient primâ facie title if the party be in possession of the house to which such right of way is appurtenant. But this is quite a different case, not depending upon possession; and a declaration in case in this general form against the bishop for refusing his licence would be demurrable. There is no primâ
[353] facie title stated, which would be sufficient, to call upon the bishop to make a return: the writ therefore must be quashed.

Per Curiam. Writ quashed. (a)

(a) See the same case upon another point, *post*.

The

The King *against* The Company of Free Fishers and Dredgers of WHITSTABLE, in the County of KENT.

Thursday, April 25th.

A Rule was obtained in the last term calling on the Company to shew cause why a writ of mandamus should not issue, commanding them to restore *Wm. Adley* to the office of a freeman of the said company. This was grounded upon an affidavit of *Adley*, stating, that the company was incorporated by virtue of an act of the 33 *G.* 3. *c.* 42. and that as a freeman he was entitled to a proportionate share of the concerns of it. That before the incorporation he was and still is one of the lessees of a certain oyster ground called the *Sea Salter Ground*, from the dean and chapter of *Canterbury*. That by the said act all the powers before belonging to and used by the company, amongst others that of making by-laws for the regulation of their fishery, were vested in the corporation. That the custom of the company in working their oyster grounds and dividing their profits is, that during the season for the dredging of oysters, every member, either personally or by deputy, is obliged, on certain days appointed by the foreman, the principal officer of the company for the time being, to dredge such a quantity of oysters as the foreman directs, which is called a stint, and to deliver the same for the benefit of * the company; thereupon the foreman pays the member a certain sum for the day's work. That the money arising from the sale of the oysters is then applied to the payment of the interest of debts due from the company, and the residue divided amongst the members. That on the 22d of *July* 1805, at a manor court, it was ordered, that if any freeman should engage in the business of sending oysters to market for sale from any oyster grounds on the *Kentish* shore, or work the same, &c. other than the oyster grounds of the company, such freeman should forfeit 10*l.* for the use of the company; and if he should refuse to pay the fine to the water-bailiff of the manor for 24 hours after demand by such water-bailiff, *such freeman so neglecting or refusing shall*

Where a corporator, who was entitled to divide a certain share of the profits of a fishery which the corporators worked and enjoyed in partnership, was *suspended* from the perception of his profits until he paid a certain fine imposed by a by-law, with the breach of which he was charged, the Court refused a mandamus to *restore him to his office*; he being still an officer, and having a remedy by an action for the tort against any who disturbed him in the lawful perception of his profits, (if the by-law were illegal, or he were not guilty of a breach of it, or had been unlawfully suspended) or, considering the corporators as partners in the fishery, he having a remedy in equity for his share of the partnership funds unjustly withholden from him.

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from thenceforth, and until such fine be paid, be wholly excluded from all share of the profits to be made thereafter by or from the joint trade in oysters of the freemen of the company; and such profits should in the mean time be divided as if such freeman so neglecting or refusing had wholly ceased to be a freeman of the said company, &c. That the deponent, as such freeman, on the 29th of *October* last, performed his stint or day's work in the company's fishery, and delivered the oysters according to the custom, and *thereby became entitled to receive from the foreman the sum of* 6*s.* which sum he demanded of the foreman, who refused to pay him; alleging as a reason for such refusal, that he should abide by the order of the Court, and should not pay the deponent until he had paid the 10*l.* agreeable to the order of Court, for working and holding another oyster ground. That the water-bailiff had also demanded of him the 10*l.* fine, which he refused to pay. The deponent then swore that he had had no notice of the holding of any meeting of the company, at [355] which he was adjudged to have offended against any order of the Court; nor was he summoned to attend, or had notice of any complaint against him for any breach of any order of Court; nor was called upon to make any defence against any charge, or to shew cause why he should not pay the 10*l.*, or why he should not be removed or suspended from his office of freeman, &c. And that by the said proceedings of the company and of their foreman, he is deprived of his share of the profits of the company. In answer to this, there was an affidavit on the merits, as to the offence committed by *Adley* within the by-law, and his being summoned to attend the Court before the fine was imposed; but this was not entered into: for

Sir *V. Gibbs* and *Bayley* Serjt. on shewing cause, objected that at all events the application for a mandamus to restore *Adley* to his office was premature, as he was not *removed* from his office, but only *suspended* from the receipt of certain profits attached to it, for which no mandamus lies. (*a*) That in effect

(*a*) *Rex* v. *The approved Men of Guildford*. 1 *Lev.* 162. 1 *Keb.* 868. 880. The mandamus was at first refused to restore one to his office who was suspended: but in the following year he appears to have been restored. *T. Ray.* 152. and 2 *Keb.* 1. And vide *The King* v. *The Mayor, &c. of London*, 2 *Term Rep.* 177., where the Court seemed to doubt whether a mandamus

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effect this would be a mandamus to the company to pay him 6*s.*, for which, if the foreman unjustly refused payment, an action would lie to recover it.

Shepherd Serjt. *Wood* and *Dampier*, in support of the rule, said that as the perception of the profits was the only mode of enjoying the franchise, to suspend the party * from this was in effect to suspend him from his office: and the by-law declares, that until the fine be paid, "he shall be wholly *excluded* from all share of the profits, &c. *as if he had wholly ceased to be a freeman of the company.*" That there was as much reason for granting a mandamus to restore one unjustly *suspended*, as one unjustly *removed* from an office; the effect being the same.

Lord ELLENBOROUGH C. J. The party, notwithstanding this suspension, has still a right to attend and vote at corporate meetings: the suspension therefore is not equivalent to a removal from his office: but he is left in possession of his office, and only excluded from participating in the profits. Then if he be legally entitled to receive his share of the profits, he may have his action for the tort against those who disturb him in the perception of them. If it were a proper case to grant any mandamus at all, it should be a mandamus to the company to pay him the 6*s.* his share of the profits, which is withholden from him; for that is the specific grievance, which he has to complain of.

Lawrence J. asked what remedy the party would have had if the foreman had, of his own accord, refused to pay him the 6*s.*? To which it being answered, that the fishery being in the nature of a partnership, he must have gone into equity; *Lawrence* J. said that the same remedy was open to him now.

Per Curiam, Rule discharged.

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damus might not go to restore an officer to the exercise of his functions if it appeared that he was suspended without just cause.

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Friday, April 25th.

SPENCELEY, qui tam, *against* SCHULENBURGH.

An attorney is bound to disclose, when called as a witness by the adverse party, the contents of a notice which he received to produce a paper in the hands of his client; the privilege of the client only extending to exclude the disclosure of any fact communicated confidentially to the witness in the character of his attorney.

IN an action for usury in a certain agreement, notice to produce the agreement was served on the Defendant's attorney, but the witness who was called at the trial to prove the service of the notice could only speak to having delivered a certain paper to the defendant's attorney, the contents of which he did not know: and the production of the paper having been demanded in Court and refused, it was proposed on the part of the Plaintiff to call the defendant's attorney, then in Court, as a witness, to prove the contents of the paper with which he had been served, in order to substantiate the notice to produce the original agreement, and to let the plaintiff into parol evidence of it if not produced. Lord *Ellenborough* however, at the trial at the sitting after last *Michaelmas* term at *Westminster*, on objection taken, inclined to think that the defendant's attorney was not bound to disclose the contents of the paper, which he had become acquainted with in his confidential character of attorney; and the plaintiff was thereupon nonsuited. A rule nisi was obtained in the last term for setting aside the nonsuit and having a new trial, on the ground that the contents of the notice with which the attorney had been served by the adverse party, not being a fact communicated to him by his own client, there could be no breach of confidence in his declaring it.

Garrow, *Reader*, and *Dillon*, now shewed cause. It is in vain to say that the defendant's attorney was not bound to produce the notice in Court, (which was admitted) if he were
[358] compellable to supply the defect of the plaintiff's evidence by giving testimony himself as to the contents of it. This was a communication made to him *as attorney* for the defendant *in the cause*, which he is restrained by the privilege of his client from disclosing. The privilege identifies the attorney with his client as to all matters which he knows only in his character of attorney; and all papers delivered to him by the adverse party as attorney become the documents and property of his client, and he cannot disclose the contents of any such from whatever quarter derived.

Sir *V. Gibbs* and *Burrough* contrà were stopped by

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Lord ELLENBOROUGH C. J.; who said that he had great doubt at the time he rejected the witness, and was afterwards satisfied that he had acted hastily. That the privilege was restricted to communications, whether oral or written, from the client to his attorney, and could not extend to adverse proceedings communicated to him as an attorney in the cause from the opposite party, in the disclosure of which there could be no breach of confidence. Here the attorney did not even acquire his knowledge of the contents of the paper from his client, even if that would have made a difference, which might be questioned, but he received the paper himself: and his privilege of attorney only extends to confidential communications from his client, and not to communications from collateral quarters, although made to him in consequence of his character of attorney.

Per Curiam, Rule absolute.

ORR and Others *against* MAGINNIS.

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It seems that proof of a protest for non-acceptance of a foreign bill of exchange is necessary to enable the payee to recover against the drawer, and that the want of it is not supplied by proof of a noting for non-acceptance and a subsequent protest for non-payment. But whether or not the protest for non-payment be sufficient in such case, where the holder, after a refusal by the drawee to accept, presented it for payment when due, and was refused payment, at any rate the holder is bound to give notice to the drawer of the non-acceptance; without which the original payee, to whom the bill was returned, cannot recover against the drawer; and it is no excuse for not giving such notice that the drawer had no effects in the drawee's hands at the time when the bill was refused acceptance or afterwards, if he had some effects (to whatever amount) in the drawee's hands when the bill was drawn.

THIS was an action by the Payees against the drawer of a bill of exchange, drawn by him at *Demerara*, on the 25th of *January* 1802, upon Messrs. *Mullian*, *Lennox*, and Co. of *Liverpool*, for 172*l.* 18*s.* 1*d.* payable at 90 days sight to the Plaintiffs or order; which bill the declaration alleged to have been duly presented to *Mullian* and Co. for acceptance, on the 19th of *July* 1802, and refused to be accepted, and afterwards when it became due and payable on the 22d of *October* 1802, was also presented for payment, and refused to be paid;

and

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and thereupon the said bill was in due form of law protested for non-payment thereof; of which premises the Defendant had notice. And then it averred, that at the time of making the said bill, and from thence until and at the time when the same was so presented to *M.* and Co. for payment, *M.* and Co. had not any effects in their hands of the defendant's, by means of which premises the defendant became liable to pay to the plaintiffs the sum in the bill specified, together with interest, damages, and charges thereon, amounting to 272*l.* 18*s.* 1*d.* when requested, and being so liable, promised to pay, &c. There were also the common money counts. Plea non assumpsit.

At the trial before Lord *Ellenborough* C. J. at the sittings after last term at *Guildhall*, it appeared that the bill in question had been drawn by *Maginnis*, the captain of a ship engaged in the *African* trade, on *Mullian* and Co. for the amount of stores furnished to the ship at *Demerara*. That at the time of the bill drawn the defendant had effects (but to what amount did not appear) in the hands of the drawers, but in *May* 1802, his whole balance, amounting then to 116*l.*, was paid to him by them, having then no notice of his bill; and in *July*, when the bill was presented for acceptance, and up to the 22d of *October*, when it was presented for payment and refused, the drawees had no effects of the drawer in their hands. The bill was *noted*, but *not protested* for *non-acceptance*; but when refused payment in *October*, was regularly protested for non-payment: but no notice was given to the drawer of the non-acceptance, he not being then to be found, and having no settled place of residence: but at that time the bill was in the hands of one of the subsequent indorsees to whom it had been negotiated, after having been indorsed and passed off by the plaintiffs; which indorsee afterwards returned the bill under protest to the plaintiffs, and received from them the amount of it with the expences. The plaintiffs were nonsuited at the trial for want of proving a protest for non-acceptance, and for want of notice to the drawer of non-acceptance.

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Taddy now moved to set aside the nonsuit and have a new trial, and contended first that a *protest* for non-acceptance was not necessary: and here it was noted for non-acceptance, and afterwards protested for non-payment; which is sufficient. [Lord *Ellenborough* C. J. It has been expressly decided that a protest for non-acceptance of a foreign bill of exchange is necessary

cessary to be proved.] (*a*) In *Goostrey* v. *Mead* (*b*) it was considered that the noting should be at the time, yet that the protest might be drawn up any time afterwards: and it was competent to the party to wait till the time of payment came, and on the drawer's refusal to pay to protest altogether for non-payment. [Lord *Ellenborough* C. J. But here there was not only no protest for non-acceptance, but no notice of it to the drawer.] 2dly, Notice of non-acceptance was not necessary, because it appeared that the drawer had no effects in the hands of the drawees, either at the time when the bill was presented for acceptance and refused, or at any time afterwards; and that according to *Bickerdike* v. *Bollman*, (*c*) *Goodall* v. *Dolley*, (*d*) and *Rogers* v. *Stephens*, (*e*) supersedes the necessity of notice, and consequently of protest. And it cannot make any difference that the drawer had some effects in the drawee's hands when the bill was drawn, as he withdrew them afterwards before the bill could be presented, of which he must have been apprised, and therefore he could receive no injury from the want of notice. And at any rate the want of notice ought not to affect the plaintiffs, who had not the bill in their hands at the time of the dishonour.

Lord ELLENBOROUGH C. J. The case of *Bickerdike* v. *Bollman* went on the ground that the drawer had no effects in the hands of the drawee *at the time of the bill drawn*, and the other cases followed on the same ground; but no case has gone the length of extending the exemption further, to cases where the drawee had effects of the drawer in his hands at the time of the bill drawn, though the balance might vary afterwards, and be [362] turned into the opposite scale; and I know that it has been a subject of regret with the very learned person who was counsel for the plaintiff (*f*) in that case, that the old rule requiring notice to be given in all cases to the drawer of the non-acceptance of his bill was so far broken in upon. But I shall anxiously

(*a*) This was decided in *Gale* v. *Walsh*, 5 *Term Rep.* 239. and vide *Rogers* v. *Stephens*, 2 *Term Rep.* 714.; in which latter case there was a subsequent protest for non-payment; but the case was decided principally on the ground that the drawer had no effects in the hands of the drawee at the time.

(*b*) At *Westm.* 1751, *Bull, N. P.* 271.
(*c*) 1 *Term Rep.* 405.
(*d*) Ib. 714. per *Buller* J.
(*e*) 2 *Term Rep.* 713.
(*f*) The present Mr. Justice *Chambre*.

resist

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resist the further extension of the exemption. The case is different when there are no effects of the drawer in the hands of the drawee at the time, because the drawer must know that he is drawing on accommodation: but if he have effects at the time, it would be very dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary: it would be introducing a number of collateral issues in every case upon a bill of exchange, to examine how the account stood between the drawer and drawee, from the time the bill was drawn, down to the time it was dishonoured. The holder is not bound to present it for acceptance till due: but if he do, and it be refused acceptance, he is bound to give notice to the drawer, in order that he may take the necessary measures to withdraw his effects if they continue in the drawee's hands.

Per Curiam, Rule refused.

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ROE, on the Demise of WEST, *against* DAVIS.

In ejectment upon a clause of re-entry in a lease on non-payment of rent against the assignee of the lease, proof by the lessor of the counterpart of the lease, by the subscribing witness, is sufficient proof of the holding upon the condition of re-entry in case of non-payment of rent. And where the witness who proved the demand of the rent had a power of attorney from the lessor for that purpose, which he notified to the tenant and had ready to produce; held sufficient, though he did not produce it at the time of the demand; the tenant not questioning his authority. The Court will not, *after* a trial, stay the proceedings on payment of the rent, &c. the stat. 4 *G.* 2. c. 28. only warranting such applications *before* trial. And that statute is not confined to cases of ejectment brought after half a year's rent due *where no sufficient distress was to be found on the premises.*

THIS was an ejectment brought upon the forfeiture of a lease (according to a proviso therein) for non-payment of rent. At the trial before *Lawrence* J. at *Gloucester,* the Plaintiff, not having given notice to the Defendant to produce the original lease, produced the counterpart, the execution of which he proved by the subscribing witness. It was objected, that the lease itself ought to have been produced, or notice given to the defendant to produce it, without which the counterpart executed only by the lessee was not legal evidence of the lease, and of the proviso for re-entry in default of payment of

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rent. And this case was endeavoured to be distinguished from *Burleigh* v. *Stibbs*, (*a*) where the part of an indenture executed by the master, wherein it was recited that *A. B.* had put himself apprentice to him, was holden to be evidence of such a binding in debt against the master for a penalty on the st. 8 *Ann. c.* 9. for not inserting the true consideration in the indenture. But this is attempted to be made evidence against a third person, no party to the instrument. 2dly, It was objected at the trial that the demand of the rent had been made by the witness, who told the defendant that he had a power of attorney from the lessor of the plaintiff for that purpose; but though it appeared that the witness had such a power of attorney with him at the time, yet it was not produced to the defendant, which it ought regularly to have been; especially to induce a forfeiture; for otherwise the defendant might not be assured that he had the authority he assumed to have. These objections were over-ruled at the trial, and the plaintiff recovered a verdict; which

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Abbott now moved to set aside and to enter a nonsuit; and stated the same objections again.

Lord ELLENBOROUGH C. J. as to the first ground. The acknowledgment of the original lessee (from whom the defendant claims) under his seal, that he held these premises under his landlord, upon the conditions and covenants therein expressed, was sufficient evidence of the holding upon such terms against one holding under the lease. And upon the second ground; It was necessary that the person who demanded the rent should be clothed with a proper authority to do so, and that he should notify it to the tenant; and it appears that he had such an authority, and that he did notify it to the tenant, and that he had a present power of satisfying him of the truth of it; but if the tenant were satisfied without the production of the power of attorney, it was not necessary to produce it.

The other judges concurred in refusing the rule.

Abbott afterwards obtained a rule, calling upon the lessor of the plaintiff to shew cause why it should not be referred to the master to compute what was due for rent, and why, upon payment of the sum so found due, together with the costs of the

(*a*) 5 *Term Rep.* 465.

ejectment

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ejectment and of this application, the proceedings should not be stayed.

Wigley opposed it upon the ground that the st. 4 *Geo.* 2. *c.* 28. only admits of such an application *before* trial, to avoid the expense and delay of a trial; but not where the landlord has been driven to trial, as in this case.

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Abbott, in support of the rule, said, that before that statute the Court exercised a discretionary power in these cases of staying proceedings any time before execution executed, which power the legislature did not mean to take away, but only made it compulsory on the Court to exercise it, if the tenant applied before trial. The cases of *Downes* v. *Turner*, (*a*) *Phillips* v. *Dolittle*, (*b*) and *Smith* v. *Parke*, (*c*) were before the statute; and probably so was *Goodtitle* v. *Holdfast*, (*d*) *E.* 4 *G.* 2. no mention being there made of the statute. Here indeed there was a trial, but that was because the ejectment was brought for another breach of covenant, as well as for non-payment of rent. (*e*) [*Le Blanc* J. It was still competent for you to have applied to the Court before trial upon the breach for non-payment of rent.] He then admitted that he had not been able to find any case since the statute where such an application had been granted *after* trial: but he said it would be more prejudicial to the landlord to drive the tenant into equity. And finding the Court against him upon the wording of the statute, he objected that the statute only applied to cases of ejectment brought after half a year's rent due, *where no sufficient distress was to be found upon the premises.*

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Lord ELLENBOROUGH C. J. The statute is more general in its operation; for though the 4th clause has the word *such* (such ejectment,) yet the second clause to which it refers is in the disjunctive; stating first, that in *all* cases between landlord and tenant, when half a year's rent shall be in arrear, and the landlord has a right of re-entry for non-payment thereof, he

(*a*) *Salk.* 597. (*b*) 3 *Mod.* 345. (*c*) 10 *Mod.* 383.

(*d*) 2 *Stra.* 900.

(*e*) The plaintiff at the trial only went on the breach of the covenant by non-payment of rent, on proof of a demand of rent and non-payment. And vide *Pure d. Withers* v. *Sturdy*, *H.* 1752, *Bull N. P.* 97.

may

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may bring ejectment, &c. *or* in case the same cannot be legally served, &c. *or* in case such ejectment shall not be for the recovery of any messuage, &c. and in case of judgment against the casual ejector or nonsuit for not confessing lease, entry, and ouster, it shall appear by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the declaration served, and that no sufficient distress was to be found on the premises, and that the lessor had power to re-enter; *then, and in every such case,* the lessor in ejectment shall recover judgment and execution, &c. It may perhaps be true, that before the statute a practice obtained in this Court of relieving the tenant up to the extent contended for; but it appears by the words of the act, that the legislature only meant to legalize that practice to a certain extent, namely, upon the application of the tenant *before* trial. If therefore we were now to extend the same relief to him *after* trial, we should be exercising the function of legislation instead of judicial construction, and should depart from the line which the statute has drawn.

Per Curiam, Rule discharged. (*a*)

(*a*) Vide *Anon. Salk.* 287. which cites *Combe* v. *Mayo,* in Lord *Hale's* time.

DAWSON and another *against* ATTY.

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Saturday, April 26th.

Goods insured on board a certain ship generally by her name, without any addition of country, and not represented to be of any particular country at the time of the policy subscribed, though the broker had before said she was *an American,* when the ship was subscribed, and though she were in fact an *American,* need not be documented as such: and therefore in case of a capture by a foreign state for want of the documents required by treaty between that state and her own, the owner of the goods may recover against the underwriters.

THIS was an action on a policy of insurance, made in general terms "on goods on board the ship called the *Hermon,*" at and from *Liverpool* to *Messina* and *Naples,* for a premium of eight guineas per cent; whereon the Plaintiff declared as upon a loss by capture. At the trial after last term at *Guildhall,* before Lord *Ellenborough* C. J. it appeared in evidence that on a

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former occasion, when the slip was subscribed, the ship was described by the broker as an *American*, but nothing of this sort was represented at the time when the policy was subscribed, but merely that it was an insurance on goods in the *Hermon*. The ship was in fact an *American*, but had no certificate of having on board no contraband of war, as required by the treaty between the United States and *Spain*; and being captured in the course of her voyage by the *Spaniards*, was condemned as prize for want of being properly documented according to the treaty. His lordship, however, thought that the want of the proper document was immaterial, as the ship was neither insured as *American*, nor represented as such at the time of the insurance effected; and therefore the plaintiff recovered a verdict.

Garrow now moved for a new trial, on the ground that the ship, being *in fact* an *American*, ought to have been properly documented as such, which she was proved not to have been: and *Christie* v. *Secretan* (*a*) was referred to.

[368] Lord ELLENBOROUGH C. J. now again said, that as the ship was not represented to be *American* at the time when the insurance was effected, the assured was not bound by it; and there being no undertaking in the policy itself that she was an *American*, there was no necessity for her being documented as such. And, the other Judges concurring,

Refused the Rule.

(*a*) 8 *Term Rep.* 192. There the policy was on goods on board the ship "*The Peggy, of George Town*," on a voyage *from Maryland and Virginia* to *Bremen*, and the broker, at the time of effecting the insurance, spoke of the ship as an *American* ship, but told the underwriters that he was directed not to warrant any thing.

The

The Company of Proprietors of the WYRLEY and ESSINGTON Canal Navigation *against* BRADLEY and Others.

Saturday, April 26th.

A canal act provided that the Canal Company should not be entitled, on purchasing lands for making a canal, to any coal mines, &c. under the same, but that such mines should belong to the same persons as would have been entitled to them if the act had not been made: but it required the owners to give notice to the company of their intention to work their mines within ten yards of the canal, and that the company might inspect the mines, and might stop the further working of them, paying compensation to the owners: held that the right of the owners to work within the ten yards was left as before the act, if after notice given by them to the company the latter did not purchase out their rights: and that the canal being damaged by the nearer approach of the mine after such notice and non-purchase, no action lay against the coal owner for such injury, which happened by the default of the company in not purchasing. Alter where the house of one claiming under a grant from the owner of the soil was undermined.

THE Plaintiffs declared that they were possessed of a certain close in the parish of *Walsall*, in the county of *Stafford*, and were proprietors and lawfully possessed of and entitled to the use, benefit, and profits of a certain canal, dug and made in, through, and over the said close, and containing water on which boats, &c. were navigated, to the profit of the company. That the Defendants were possessed of a coal mine, near to, and under the said close of the company, and near to and under the said canal; yet that the defendants, well knowing the premises, but intending to deprive the company of their profits of the navigation, &c. so wrongfully, negligently, incautiously, and improvidently cut and dug their coal mine, and worked the same so near the said close of the company, and to the sides, banks, and bottom of the canal, and removed such large quantities of coal and soil from out of the said coal mine, and so near to the sides, &c. of the canal, that 300 yards of the sides, banks, and bottom of the canal sunk, gave way, and were damaged and destroyed, and great quantities of water ran out of the canal and were wasted, and the canal was rendered impassable for boats, &c. for six months, and became of no use or benefit to the company, by means of which the company was obliged to expend 500*l.* in repairs, &c. Plea not guilty.

The stat. 32 *Geo.* 3. *c.* 80. for making and maintaining this canal, provides (*s.* 6.) "That nothing in this act contained shall entitle the company, on purchasing any lands for making the canal, to any mines of coal, &c. which shall be found in cut-

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ting, or shall be under the same, but that all such mines shall belong to such persons as would have been entitled to the same in case this act had not been made." *Sections* 58, 59, 60, and 61, specify the method to be observed in working the mines within 10 yards distance of the canal; and in particular, *s.* 61. enacts, "that when and as often as the owner of any mine of coal, &c. lying under or within the distance before limited from the said canal, shall be desirous of working the same, such owner shall give notice in writing under his hand of such intention to the clerk of the company, at least three calendar months before he shall begin to work such mine; and upon the receipt of such notice it shall be lawful for the company to inspect such mine, in order to determine what coal, &c. may be gotten without prejudice or damage to the canal: and if the company shall refuse or neglect to inspect such mine within 31 days after notice, it shall be lawful for the owner of such mine, and he is hereby authorised to work such part of the said mine as lies under the canal, or within the distance aforesaid: and if
[370] upon such inspection as aforesaid the company shall refuse to permit the owner of such mine to work such part thereof as lies under the said canal, or within the said distance, as they might have gotten, or in any other manner obstruct or prevent such owner from getting the same, then the company shall, within three calendar months after such refusal or obstruction, pay to such owner such price for the same as the next adjoining mines shall have been sold for or valued at: and if any dispute shall arise between the company and any such owner touching the same, it shall be settled by commissioners," &c.

At the trial before *Lawrence* J. at the last *Stafford* assizes, it appeared in evidence that the defendants, before they began to work their mine within the given distance of the canal, had given notice of their intention to the company, who, after sending persons to examine the same, declined purchasing out the defendants' rights, and left them to go on with their works; in consequence of which the defendants continued working on the mine in the usual way, till the damage happened by a partial giving way of the sides and bottom of the canal. But the learned Judge, being of opinion upon the construction of the act of parliament, that the legislature had left to the owners of the lands the entire dominion and benefit of their property in every

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every respect not otherwise expressly provided for, and that the defendants had done every thing which they were required to do by the act, and that it was the company's own fault if upon the notice received they did not choose to purchase out the defendants' rights, he nonsuited the plaintiffs.

Dauncey now moved to set aside the nonsuit, and have a new trial, on the ground that the defendants were bound so to use their own as not to injure the plaintiff's property. That the 61st section did not authorize the owners of mines near the [371] canal to work at all hazards, though the company refused to purchase, but only left them as in other cases, to work at their own discretion and peril. And he mentioned a case which some time before had been tried by the same learned Judge, between the *Birmingham* canal company and *Hawkesford* and others, where, under similar circumstances, though upon a different act of parliament, (*a*) that company had obtained a verdict. And he also referred to a case some years ago, where the owner of a house near *Newcastle*, which was undermined by a colliery of the late Lord *Lonsdale*, and fell down in consequence of it, recovered damages against him.

LAWRENCE J. said he had no distinct recollection of the former case before him; but if the act of parliament in that case were not very differently framed from the present, he thought his former opinion not so well founded as in the present case. And

All *the Court*, after consultation, were now of opinion, that the meaning of the act of parliament in requiring the coal owners to give notice to the company of their intention to work their mines within a certain distance of the canal, and the liberty given to the company to inspect the works, and to prohibit the owners, upon making compensation to them, from working [372]

(*a*) The clause in the *Birmingham* Canal act, 33 *G. 3. c. 92. s. 99.* touching the manner of working the adjoining mines, is materially different from the clause in question. After providing that nothing in the act shall extend to defeat, prejudice, and affect the rights of any lords of manors, commons, or waste grounds, or the owners of any lands, &c. through which the canal shall be cut, to the mines, &c. lying within or under the same, but all such mines are reserved to such lords and owners to work the same, &c. there follows "*provided that in working such mines, &c. no injury be done to the said navigation.*"

within

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within that distance, was for the purpose of enabling the company to purchase out the rights of the coal owners, if they thought their canal works likely to be endangered by the nearer approach of the miners: but if the company declined the purchase, as they had done in this case, the coal owners were left to their common law rights, as if no canal had been made, and they might take every part of their coal in the same manner as they might have done before the act passed; their former rights in that respect not having been taken away by the act; which had only appropriated the surface of the land and so much of the soil as was necessary for the cutting and making of the canal, leaving the coal, &c. to the owners, to be enjoyed in the same manner as before: and the legislature had only given the land owners a compensation for so much of the soil as they had deprived them of. And this they said was not like the case where damages were recovered against the late Earl of *Lonsdale*, for undermining a person's house; for there the party claimed under a grant from the owner of the land, and the injury done was against the land owner's own grant.

Rule refused.

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Wednesday, April 30th.

The KING *against* The Inhabitants of RICKINGHALL INFERIOR. (*a*)

A pauper placed by the parish with a parishioner, upon an agreement between the latter and the parish officers to find board, washing, and lodging for the pauper at 2*s.* 6*d.* per week, and that the pauper was to do what he was set about, does not constitute the relation of master and servant between such parishioner and the pauper so as to enable the latter to gain a settlement as by hiring and service. Neither does such relation arise by implication from a continuance of services by the pauper to the parishioner; living with him as before, after the parish had refused any longer to continue the parochial allowance; and the pauper, who was a *Greenwich* pensioner, going there twice a year without asking or receiving the leave of the parishioner; the latter, however, not refusing leave when informed of the other's going.

TWO justices by an order removed *Henry Saunders*, his wife, and daughter, by name, from the parish of *Rickinghall Superior* to that of *Rickinghall Inferior*, both in the county of *Suf-*

(*a*) I was not in court when the case was called on; but I collected afterwards the substance of what passed.

folk;

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folk; which order was confirmed by the Sessions on appeal, subject to the opinion of this Court on the following case:

The pauper *H. Saunders*, a *Greenwich* pensioner, settled in the parish of *Redgrave*, came there in the year 1801, disabled by the loss of a leg. On the 5th of *March* in that year the parish officers of *Redgrave* agreed verbally with *Robert Crowe* of *Rickinghall Inferior*, lime-burner, that *H. Saunders* should live with him till the 8th of *November* following, and do for him whatever he set him about. The parish of *Redgrave* agreed to pay *Crowe* 2*s.* 6*d.* per week, and *Crowe* to find board, lodging, and washing for *Saunders*. Under these terms *Saunders* lived with *Crowe* till *Christmas* following, when *Crowe* went with *Saunders* to the parish officers of *Redgrave*, and refused to keep him any longer unless they would increase the allowance. They consented to increase it to 4*s.* per week; and *Crowe* thereupon agreed to take *Saunders* again till the *Easter* following. *Saunders* returned and staid accordingly in the same manner. At *Easter* the parish of *Redgrave* refused to continue *Saunders* upon an allowance, and thereupon *Crowe* sent him home to *Redgrave*, [374] whence he returned to *Crowe;* and without any new express agreement, continued to live with him in the same manner as before until *October* 15th, 1804, when he ceased to live with *Crowe* on account of his marrying. During the time that *Saunders* lived under the first agreement with the officers of *Redgrave* he attempted to absent himself from *Crowe* to make holiday; but *Crowe* told him he was his servant by the agreement with the parish, and that he could not go without his leave, which however he did. He went twice in the year to *London* to get his pension from *Greenwich* Hospital, and was absent about two or three weeks at a time. He used to tell *Crowe* when he was going; but he did not ask leave, nor did *Crowe* refuse. During the whole time *Saunders* lived with *Crowe* he was employed by him in chopping chalk. He did no work for any other person. He slept in the parish of *Rickinghall Inferior*, and received now and then sixpence from *Crowe* when he did little jobs for him on *Sundays;* and has done nothing since to gain a settlement. While *Saunders* was with *Crowe*, after the parish officers of *Redgrave* had refused to continue the allowance, he received from them, on his application for relief, at one time half-a-guinea, and at another half-

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The KING *against* The Inhabitants of RICKINGHALL INFERIOR.

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half-a-crown; and once the parish officers of *Redgrave* took for themselves his pension from *Greenwich* Hospital. The Sessions, besides confirming the order of removal, ordered the appellants to pay to the respondents the common costs of forty shillings, considering the statute of the 8th and 9th *W.* 3. imperative on them in that respect.

Frere, in support of the order of Sessions, proposed to consider, 1st, if the relation of master and servant existed between the pauper and *Crowe;* 2dly, if the pauper's absenting himself during the service prevented the settlement; 3dly, if the magistrates were obliged to give costs. Upon the latter the Court gave no opinion; and upon the first, finding the opinion of the Court strongly against him, as to the agreement between the parish officers and *Crowe*, he relied principally upon the service of the pauper with *Crowe*, from whence a general hiring was to be implied, after the parish officers had ceased to pay *Crowe*. But,

The Court (Lord *Ellenborough* C. J. absent) were clearly of opinion that no settlement was gained. The relation of master and servant never existed between *Saunders* and *Crowe*. The former was placed with *Crowe* by the parish officers as a pauper, to be maintained by him; and the parish officers had no authority to hire *Saunders* out to the other. And after the parish allowance for *Saunders* was withdrawn from *Crowe*, the latter permitted *Saunders* to live with him out of charity, without any contract as between master and servant.

Alderson, who was to have argued against the orders, was not heard.

Orders quashed.

Ex parte

Ex parte GILL.

Friday, May 2d.

ESPINASSE moved yesterday for a writ of habeas corpus to bring up this person, an apprentice, who had bound himself at the age of 18 years to serve till 25, and who, after he was 21 years of age, had been committed to the house of correction upon a conviction before two magistrates, founded on the stat. 20 *Geo.* 2. *c.* 19. at the suit of his master, for a misdemeanor in absenting himself from his service; *Gill* having insisted before the magistrates that the indentures which had been executed by him when an infant, were not binding upon him after he came of age, but that he might elect to avoid them, as he had done, before the offence alleged. And he cited the case *Ex parte Davis*, (*a*) as in point. And now the return to the writ made by the keeper of the house of correction was produced; which set forth a regular conviction of this party under the statute for a misdemeanor in absenting himself from his master's service and refusing to obey him, wherein nothing appeared of the objection arising from the age of the party. Whereupon, after hearing *Espinasse* on his behalf,

Where, upon a habeas corpus to bring up the body of an apprentice the keeper of the house of correction returned, with the body of the party, a regular conviction of him by two magistrates on the stat. 20 *G.* 2. c. 19. for a misdemeanor in absenting himself as an apprentice from his master's service; it is no answer to shew by affidavit that the party had bound himself *when an infant* to serve till 25, and that when he came of age he elected to avoid the indentures, after which the offence

The Court said that they could do no otherwise than remand the party; for it appeared by the return that he was committed in execution upon a regular conviction: and that however the circumstances now laid before the Court by affidavit might, if well founded, be matter of defence * against the charge before the magistrates, they could not be examined by the Court now. That if the defence had been properly made before the magistrates, and they had disregarded it, the party had a remedy against them; but that this Court had no authority to direct that the apprentice should be discharged from his indentures;

imputed had been committed; for this was proper matter to be shewn to the magistrates below; who, if the matter shewn to them were true, acted at their own peril in committing the party: but this Court have no power to discharge an apprentice from his indentures; and are bound by the return of a regular conviction, where the objection does not appear on the face of the return, to remand the party.

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(*a*) 5 *Term Rep.* 715.

and

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and that there was a mistake in that respect in the report of *Davis*'s case; the judgment of the Court there being that the apprentice should be discharged out of the custody of her master, in whose custody she was then brought up before the Court.

The party was remanded.

Wednesday, May 7th.

The KING *against* The Inhabitants of BINEGAR.

An order of removal of *J. S. and B. his wife*, made *upon the examination of the wife*, adjudging that they *lately* came into the parish of *K.* and *are* likely to become chargeable to it, and *were* last legally settled in *M.* is good upon the face of it, and conclusive upon the parish of *M.*, as to the marriage and settlement of the husband and wife; so that upon a subsequent removal of the wife, describing her as *B. S. single woman*, from *M.* to *B.*, *M.* cannot shew in evidence that the marriage was null and void.

ON the appeal by the parish officers of *Binegar*, in the county of *Somerset*, against an order of two justices for the removal of *Elizabeth Savage*, otherwise *Walters*, by the name of *Elizabeth Walters*, single woman, from the parish of *Midsomer Norton*, in the said county, to the parish of *Binegar*, the order of removal was affirmed by the Sessions, subject to the opinion of this Court on the following case:

On the 25th of *April* 1793, by an order of two justices made on the complaint of the parish officers of *Kilmersdon*, it was complained and adjudged in the following words, viz. "That *John Savage*, labourer, and *Betty his wife* (the said *Betty* being the pauper above removed,) lately came and intruded themselves into the said parish of *Kilmersdon*, endeavouring there to settle as inhabitants thereof, contrary to law, not having any way acquired a legal settlement therein, and are likely to become chargeable * thereto, we do, upon due examination, adjudge the said complaint and premises to be true: and we do further, *upon the examination of the said Betty, the wife of the said John Savage*, taken upon her oath, adjudge that the said *John Savage*, and *Betty* his wife, *were* last legally settled in the said parish of *Midsomer Norton*." And the said *Betty* was removed from *Kilmersdon* to *Midsomer Norton*; but against this order of removal there was no appeal. On the 20th of *July* 1799, by another order of two justices, made on the complaint of the parish officers of *Wellow*, in the said county, it was complained and adjudged in the following words; viz. "That *Elizabeth Savage* (being the said pauper) lately came to inhabit in the

said

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said parish of *Wellow*, contrary to law, not having any ways gained a legal settlement there, &c.; and that the said *Elizabeth Savage* is actually become chargeable to the said parish of *Wellow;* we the said justices, upon due examination of the said complaint and premises, and also upon the examination of the said *Elizabeth Savage*, upon her oath before us, and upon due consideration by us had in the premises, do adjudge the same complaint and premises to be true: and we do likewise adjudge that the said last lawful settlement of her the said *Elizabeth Savage* is in the said parish of *Midsomer Norton*." And she was therefore removed from *Wellow* to *Midsomer Norton*. And against this order likewise there was no appeal. At *Lady-day* 1803 the said *Elizabeth* hired herself for a year, at the wages of four guineas, as a dairy maid, to *J. Brooks* of *Binegar*, and served with him in the parish for 16 months. The said *John Savage* is still living. After *Elizabeth* left the service of *Brooks* she returned to *Midsomer Norton*, and became chargeable to that parish. In *May* last *John Savage* was committed to the house [379] of correction for having run away and left the said *Elizabeth*, therein called *his wife*, so chargeable, until the next quarter sessions held for the said county in *July* last, when the charge in the said commitment being duly proved to the Sessions, upon oath, in the presence of the said *John Savage*, to be true, the Court adjudged *Savage* to be a rogue and vagabond, and a male upwards of 12 years of age, and ordered him to be detained in the house of correction for three days, and that before he was discharged from thence he should be sent to be employed in his majesty's service by land in his majesty's 40th regiment of foot. But *John Savage* had never contributed to the maintenance of the said *Elizabeth*. The respondents produced evidence to the Court that a marriage solemnized between the said *John Savage* and the said *Elizabeth*, before either of the said orders of removal were made, was a nullity, and the nullity of such marriage was not disputed.

The question for the opinion of the Court was, whether or not the respondents were estopped either by the former orders of removal, or by the adjudication of the said *John Savage* to be a vagrant, for running away and leaving the said *Betty*, who is in such adjudication considered as *his wife*, from giving any evidence whatever to prove the said marriage a nullity.

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Garrow and *Topping* in support of the order of Sessions. The second order which removes *Elizabeth Savage*, treating her as a single woman, may be laid out of the case; for it does not necessarily upon the face of the order include the judgment of the justices upon the question of the marriage, and non constat that it was an issue before them. And as to the order of vagrancy, it is a mere ex parte proceeding, and cannot conclude
[380] the fact of marriage. The question then reverts to the validity of the first order of removal; for if that be bad upon the face of it, it cannot conclude the parish; as it must be admitted that it would if good, according to *Rex* v. *Silchester*, (*a*) and *Rex* v. *Rudgeley*. (*b*) Now here the order was illegal on the face of it; 1st, because it is a removal of the husband and wife, stated to be made upon the examination of the wife only, who can only know the fact of her husband's settlement by hearsay from him. [Lord *Ellenborough* C. J. That does not follow. She may know the fact as well as any other witness.] 2dly, It does not appear that the parties ordered to be removed were within the jurisdiction of the removing magistrates, without which they had no jurisdiction. It is only stated that the paupers *lately* came into the parish of *Kilmersdon*, not that they were then in the parish, at the time of the order made. Lord *Ellenborough* C. J. The order states, and the magistrates adjudge it to be true, that the paupers *are likely to become chargeable* to the parish, which could not be if they were not in the parish at the time.] 3dly, There is no adjudication of a *present* settlement; only that the paupers *were* last legally settled in *Midsomer Norton*. [Lord *Ellenborough* said, that it referred to the time of the complaint made, and the Court could not intend an intermediate settlement between the hearing of the complaint and the making the order of removal.]

The Court all concurred in quashing the order; considering the first order of removal as good upon the face of it, and, according to *Rex* v. *Silchester*, conclusive upon the question of the marriage, which was involved in the judgment of the justices.

Orders quashed.

Sir *V. Gibbs* and *Pell* were to have opposed the orders.

(*a*) *Burr. S. C.* 551. (*b*) 8 *Term Rep.* 620.

The

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The KING *against* The Inhabitants of BARMBY-IN-THE-MARSH. (*a*)

Wednesday, May 7th.

The residence of an apprentice with his grandmother in a different parish from his master on account of illness, though with the consent of the master, is not referable to the apprenticeship, so as to gain him a settlement in such parish.

TWO justices, by an order, removed *J. Martindale*, his wife and children, by name, from the township of *Barmby-in-the-Marsh*, in the East Riding of the County of *York*, to the township of *Selby*, in the West Riding. The sessions on appeal reversed the order, subject to the opinion of this court on the following case:

The pauper, *J. Martindale*, was bound apprentice by indenture dated the 1st of *April* 1794, for four years, to *J. Brealby*, of *Hunslet*, in the West Riding, who was the master of a small vessel trading on the river *Ouse*. The pauper slept more than 40 nights during such apprenticeship at *Selby*, at different times, but slept the last night thereof at *Barmby-in-the-Marsh*, at his grandmother's, in which latter place he had before slept more than 40 nights, in consequence of his being ill of a fever. He so went to *Barmby-in-the-Marsh* with the consent of his master, who received him again as his apprentice, and he never slept there except as above stated.

Lambe, in support of the order of sessions, contended that the pauper was settled at *Barmby-in-the-Marsh*, having slept for more than 40 nights, including the last day of his apprenticeship, in that township *with the consent of his master*. And the circumstance of his going to his grandmother there on account of illness cannot vary the question; for the apprenticeship still subsisted in point of law, and all the cases go upon the point of the master's consent to the residence in any place for 40 days, which is here expressly found. The case of the *King* v. *Titchfield*, (*b*) (which had been mentioned on a former day, (*c*) when this case was first called on, as deciding against the settlement in *Barmby*,) went on the ground of the indentures having been delivered up, and thereby virtually cancelled before the resi-

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(*a*) I was not in court when this case was decided, but was furnished with accurate instructions of what passed.

(*b*) *Burr. S. C.* 511.

(*c*) *Rex* v. *Sutton*, 5 *Term Rep.* 657. was also then mentioned, which was the case of a servant.

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The KING *against* The Inhabitants of BARMBY-IN-THE-MARSH.

dence with the pauper's father on account of illness. But he relied on *Rex* v. *Charles*, (*a*) where the apprentice, having become a cripple, was put by his master to live at his grandmother's, at 1*s.* 6*d.* a week, in another parish, where he resided the last 40 days; by which residence he was deemed to be settled there. *Aston* J. said, that that could not be deemed a casual or accidental residence, and therefore distinguished it from cases of that sort. And this is no more a casual residence than that was.

Topping, contrà, was stopped.

The Court were all of opinion that the residence of the pauper in *Barmby-in-the-Marsh*, being on account of his illness, was not a residence *as an apprentice:* and that the stat. 3 *W.* c. 11. which directs that if any person shall be bound an apprentice and inhabit in any parish, *such binding and inhabitation* shall be adjudged a good settlement, &c. must be understood of an inhabitation referable in some way to the apprenticeship. But that the residence here with the grandmother was no more referable to the apprenticeship, than if the pauper had resided in a hospital or prison.

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Order of Sessions quashed.

(*a*) *Burr. S. C.* 707.

Monday, May 12th.

DESHONS *against* HEAD.

As by the practice of the Court they will not grant over of an original writ, and yet a plea in abatement for want of an addition to the defendant in such writ is bad without over; the effect is to prevent such a plea from being pleaded; and therefore if pleaded the Court will quash it.

THIS was a rule calling on the Defendant to shew cause why the plea filed in this cause should not be quashed, and why the rule to reply should not be discharged, and the Plaintiff be at liberty to sign judgment, &c. The defendant was sued by original upon a bill of exchange, of which he was acceptor, and he pleaded in abatement, with an affidavit verifying the plea, for want of an addition to him in the original writ, without first craving oyer of it.

Lambe shewed cause, and objected that if the plea were a nullity, the plaintiff might have signed judgment as for want of

a plea: or if it were ill pleaded, he might have demurred to it; but this he said was a novel application, which the Court would not entertain.

Comyn, in support of the rule, said that the plaintiff having been ruled to reply, there might have been a difficulty in signing judgment as for want of a plea: but that the defendant not having craved oyer of the writ, the court ought not to receive the plea. In 5 *Com. Dig.* 123. Pleader P. 2. it is said that "the defendant shall not plead in abatement of the writ before oyer of it; and 1 *Com. Dig.* 42. Abatement. H. 1., *Vanderplank* v. *Bankes*, (*a*) and *Hole* v. *Finch*, (*b*) are to the same effect; which, together with all the other cases on the subject, are [384] collected in Mr. Serjt. *Williams*'s ed. of *Saunders*, 1 vol. 318. *n.* 3. the result of which is, that at this day no advantage can be taken either of a defective original, or of a variance between it and the declaration; this Court having come to a resolution in *Boats* v. *Edwards*, (*c*) not to grant *oyer* of the original writ in future, it having been used for the mere purpose of delay. Then the plaintiff may either demur, as in some of the former cases, or sign judgment as for want of a plea, as in *Murray* v. *Hubbart* (*d*) and *Gray* v. *Sidneff*; (*e*) or move to quash the plea, as was done in *Wallace* v. *The Duchess of Cumberland*, (*f*) in an analogous case, where the defendant, after craving oyer of a deed, set it out defectively.

Lord ELLENBOROUGH C. J. (after consulting with the other Judges) said that the embarrassment of the case arose from the prior decision of the Court not to grant oyer of the original writ; after which it seemed incongruous to reject a plea for want of such oyer; and that, if the former decision had been to be considered now for the first time, he did not think he should have concurred in it; but having been acted upon so long, it was now too late to overturn it. The effect, however, of the different decisions was to prevent such a plea from being pleaded; and therefore the Court made the

Rule absolute.

(*a*) 2 *Wils.* 85. (*b*) Ib. 395. (*c*) *Doug.* 227.
(*d*) 3 *Bos. & Pull.* 395. (*e*) 1 *Bos. & Pull.* 645.
(*f*) 4 *Term Rep.* 571.

PARKER

1806.

Friday, May 16th.

PARKER *against* GORDON.

Whether or not the fact of putting a letter into the post-office, containing notice of the dishonour of a bill to the drawer, to whom it was directed, be of itself sufficient evidence to be left to the jury that such notice reached the drawer: at any rate, if a bill be accepted payable at *A.*'s, who is the acceptor's banker, the party taking such special acceptance, which he is not bound to do, thereby impliedly agrees to present it for payment within the usual banking hours at the place where it is made payable: and if he present it after such hours, without effect, it is no evidence of the dishonour of the bill, so as to charge the drawer.

IN an action by the indorsee of an inland bill of exchange against the drawer, which was tried before Lord *Ellenborough* C. J. at the last sittings in term, it appeared that the bill had been accepted by the drawee, payable at *Davison* and Company's, who were his bankers in *London*. That on the day when it became due it was presented for payment by a notary's clerk at the banker's shop, but not till past six o'clock in the evening, after the usual banking hours, when the shop was shut and the clerks gone away. And the only proof of notice to the drawer of this dishonour was by shewing that a letter directed to him, containing such notice, was put into the receiving post-office in Inner Temple Lane. But his lordship was of opinion, that the holder of the bill, by taking this special acceptance for payment of it at the acceptor's banker's, bound himself to present it for payment at the usual banking hours there: and not having done so, there was no evidence of the bill's having been presented for payment to the acceptor, and dishonoured. But supposing that were otherwise, yet that the mere putting of the letter into the post-office, without further evidence that it reached the hands of the drawer, was not sufficient proof of notice of the dishonour; and therefore he nonsuited the plaintiff.

Marryatt now moved to set aside the nonsuit; and as to the sufficiency of the notice to the drawer of the dishonour he cited *Sanderson* v. *Judge*, (*a*), where the putting *a letter to the indorser into the post-office, informing him of the dishonour of the note by the maker, was holden sufficient to charge the indorser. [And on the authority of this case, which had not been mentioned at the trial, Lord *Ellenborough* C. J. said, he saw no objection to granting a rule to shew cause. But this became unnecessary by the opinion of the Court on the other point.] On

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(*a*) 2 *H. Blac.* 509.

the

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PARKER *against* GORDON.

the other ground he contended, that whether the bill were accepted payable at a banking house (which however did not appear upon the face of it; for *Davison* and Co. were not stated to be bankers on the face of the bill,) or at any other place, could not alter the general law respecting the time for making a demand of payment; which might be done at any reasonable hour of the day, without reference to what are called banking hours, of which the law could not take notice; it being a matter depending altogether on the personal convenience of different bankers; those in the city keeping their houses open for payments till five o'clock, and those at the west end of the town till six in the evening. And in *Leftley* v. *Mills*, (*a*) the Court said they could not take notice of what were called banking hours; but seemed to consider that if a demand were made at any reasonable time of the day, it would be sufficient: this therefore was a question for the jury to have decided.

Lord ELLENBOROUGH C. J. There was no dispute about the facts at the trial; and when I conceive that whether the demand were made within due time or not is a question of law. The question is now brought to this, whether the bill were dishonoured? The person on whom it was drawn accepted it, payable at *Davison* and Company's, who were his bankers; which was done for the purpose of facilitating the payment of it: and if it were refused payment there on due presentation, it would be a sufficient dishonour of the bill whereon to charge the drawer. But if a party choose to take an acceptance payable at an appointed place, it is to be presumed that he will inform himself of the proper time for receiving payment at such place, and he must apply accordingly: and if by going there out of due time the bill be not paid, it is his own fault, and he cannot proceed as upon a dishonour of it; at least not without going a step further, and presenting it for payment to the party himself: otherwise it is fishing for the dishonour of a bill made payable at a banker's, to present it there for payment at a time when it is known in the usual course of business that it cannot be paid.

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GROSE J. declared himself of the same opinion.

(*a*) 1 *Term Rep.* 171.

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LAWRENCE J. The party might have refused to take the special acceptance, but if he chose to take the acceptance in that manner, payable at the banker's, does he not agree to take it payable at the usual banking hours? If this were a sufficient demand for payment, no person would be safe in lodging money at a banker's for the purpose of answering bills made payable there: for if the holder might apply for payment at any time of the day, by making his application at an unusual time, it would insure the dishonour of the bill. But where a bill is accepted in this manner, it must be understood by all parties concerned, that it is to be presented for payment at the banker's within the usual hours of business; and not having been so presented in this case, there was no evidence of the dishonour of it, in order to charge the drawer.

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LE BLANC J. If a party will take an acceptance in this manner, payable at a banker's, he must present it at a proper time, according to the known method of conducting the banking business; otherwise the greatest inconveniences to trade would ensue.

Rule refused. (*a*)

(*a*) Vide *Bishop* v. *Chitty*, 2 *Str.* 1195.

The

The KING *against* CRISP.

Saturday, May 17th

A conviction on the malt act, 42 *G.* 3. *c.* 38. *s.* 30. dated 4th of *June* 1805.

THIS was a conviction on the malt act 42 *Geo.* 3. *c.* 38. *s.* 30. stating, "that *this* 29*th of May* 1805, at *Woodbridge*, in the county of *Suffolk*, *R. P.* officer of excise, exhibiteth to us stated that on the 29th of *May* 1805, *R. P.* informeth us (three justices) that at the time of committing the offence after mentioned, the defendant was a maltster, *and within three months now last past*, viz. on 12th *of May now last past*, at *W.* &c. did wet certain *grain* of him the defendant, then and there *making into malt*, in a certain *stage of operation*, &c.: and thereupon *afterwards on the* 4*th of June* (no year mentioned) at *W.* the defendant having been duly summoned, *now here appears* before us, &c. and having heard the information read, is asked, &c. and thereupon the defendant *denieth*, &c. whereupon we do *now here* proceed to examine, &c. and *on the day and year last aforesaid*, at *W.* &c. *J. F.* officer of excise *now here comes* before us, &c. and *deposeth*, &c. in *the premises*, that he *surveyed* the *malt-house of the defendant* at *W.* aforesaid, *on the said* 12*th of May*, and found *a floor of malt in operation*, very wet, &c. and the defendant is *now here* again called upon by us, &c. for his further defence, but no other evidence *is now here* produced, &c. *whereupon* it *is* adjudged, (stated to be signed and sealed on this 4th of *June* 1805.) Held

1st, That the offence being charged to be committed on the 12th of *May now last past*, the antecedent date being the 29th of *May* 1805, when the information was exhibited, and the conviction being dated on the 4th of *June* 1805, and it being also alleged that *the offence* was committed *within three months now last past;* it does appear that the offence was committed on the 12th of *May* 1805, and not in 1804. The words *now last past* after the 12*th of May*, referring to the *day* of the month, and not to the *month;* and therefore the information was in time.

2dly, The witness swearing to the offence being committed on "the *said* 12th of *May*," sufficiently refers to the 12th of *May* 1805, the day charged in the information, so as to shew that the offence was committed within the three months: For it is the relation of the evidence, *by the magistrates*, who also state that the witness deposed *in the premises*.

3dly, By the statement of the proceedings in the conviction, it appears to have been all one continuing transaction, from the appearance of the defendant after the summons to the close of the conviction. And this appears, both from the antecedent dates of *May* 1805, and the date of the conviction, to have been on the 4th of *June* 1805, because the defendant is stated to have been afterwards (*i. e.* after the information exhibited) summoned, and to have appeared on *the* 4*th of June*, and the conviction was signed and sealed on the 4th of *June* 1805. And it thereby also appears that the evidence was given in the defendant's presence, as his departure pending the continuance of the transaction will not be presumed. And it thereby also appears that the conviction took place on the 4th of *June* 1805.

4thly, The witness deposing that he found "a floor of *malt* in operation," very wet, &c. being the language of the witness and intelligible to a common intent, sufficiently proves the offence charged of wetting *corn or grain making into malt, in a state of operation*.

5thly, The witness, an excise officer, stating in language appropriate to his employment, that he *surveyed* the *malt-house* of *the defendant* on the 12th of *May*, and there found a floor of malt in operation, &c. is prima facie evidence that the defendant was at that time a *maltster*; for otherwise it could not properly be called *his malt house*, nor would the officer have had authority to *survey* it; as by the excise laws a party must enter his malt-house before the officer can survey it.

R. F.

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The KING *against* CRISP.

R. F. &c. (three justices of the peace,) an information and complaint; and thereby informeth us, the said justices, that before and at the time of the committing of the offence hereafter mentioned, one *Steffe Crisp* was a maltster and maker of malt, viz. at *Wangford*, in the said county of *Suffolk;* and so being
[390] there such maltster and maker of malt, he, the Defendant, *within three months* now last past, viz. on the 12*th of May now last past*, at *W.* did wet, &c. certain corn and grain of him the said *S. C.* then and there making into malt in a certain state and stage of operation, viz. while the said corn and grain so making into malt as aforesaid was a floor, after the said corn and grain had been taken from and out of the cistern of him the defendant, used by him for steeping the said corn and grain, and before the end of twelve days from the time when the said corn and grain had been so as aforesaid taken from and out of the said cistern; contrary to the form of the statute, &c. whereby and by force of the statute, &c. he, the defendant, hath forfeited 200*l.* And thereupon the said *R. P.* who prosecuteth as aforesaid, prayeth judgment, &c. and that the defendant may be summoned to answer the premises, before us, &c. and that he the said *R. P.* may have one moiety of the said penalty and forfeiture. And thereupon *afterwards*, *to wit*, *on the 4th of June*, *at W.* &c. the defendant having been previously duly summoned, &c. to appear before us the said justices, to make his defence to the said information, now here appears before us, the said justices, in his proper person; and having heard the said information read to him, he is asked by us, the said justices, &c. why he should not be convicted of the premises charged upon him in and by the said information; and thereupon he, the defendant, denieth the matters contained in the said information, and saith that he is not guilty thereof as is therein alleged: whereupon we the said justices, do *now here*, at the request of the said informer, proceed to examine into the truth of the matters contained in the said information; and thereupon *on the day and year last aforesaid*, at *W.* &c. *J. F.* officer of excise, and *W. R.* officer of excise, on the part of the said
[391] informer now here come before us, the justices, and being duly sworn, &c. depose and say *in the premises* as follows. And first the said *J. F.* on his oath saith, that he is an officer of excise. That the said defendant *is a maltster at Wangford*, in this county. That he, with the said *W. R. surveyed the malt-house of the defendant*,

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fendant, at *W.* aforesaid, *on the said 12th of May*, and found *a floor of malt in operation very wet*. That the said floor of *malt* had been only four days out of *the cistern*. That the said floor had been watered since it was thrown from the cistern. And the said *W. R.* upon his oath saith, that he *surveyed the said malt-house* with the last witness on the said 12th of *May*, and he is sure that the said floor of malt had been watered since it was thrown from the cistern. That it had been out of the cistern only four days on the said 12th of *May*. And the said defendant is now here again called upon by us the said justices for his further defence in the premises; but no other evidence is *now here produced* to us, &c. Whereupon all and singular, the premises being seen, &c. it appears to us the said justices, that the defendant is guilty of the premises charged upon him in and by the said information, in manner and form as is therein alleged. It is therefore adjudged by us, &c. that the defendant be convicted, &c. of the said offence charged upon him as aforesaid, according to the form of the statute, &c. And we do adjudge that the defendant hath for his said offence forfeited 200*l.* &c. In witness whereof, we the said justices, to this our record of conviction have set our hands and seals at *W.* aforesaid, this 4th of *June* 1805," &c.

Abbott took several objections to this conviction. 1st, The information does not expressly shew the offence to have been committed within three months before. The information is taken on the 29th of *May* 1805, and it charges an offence on the 12th of *May now last past*, which is uncertain and bad; as it may either refer to the 12th *day* last past of the same month, or to the *month* of *May* last past, which could carry it back to the antecedent year, and be out of time; and if either be preferred it must be the *month*, being the last antecedent.

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Per Curiam. It is alleged to be "*within three months* now last past;" and coupling that with the other allegation it makes it quite clear.

2d objection. The evidence does not prove the offence to have been committed within the three months. The witness swears that on *the said 12th of May* he surveyed the defendant's malt-house, &c. but it does not appear to what 12th of *May* he referred; for non constat that the information was read over in the presence of the witness; or that he referred to it:

and

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and these are the words of the witness and not of the magistrates.

Per Curiam. The evidence is stated as the relation of it by the magistrates. It is in the third person, " *he* surveyed," &c. and not in the first person, as coming out of the witness's mouth, and therefore it may well refer to the same day before mentioned in the information; and the witnesses are said to depose *in the premises,* which incorporates it with what goes before.

3d objection. It does not appear that the evidence was given in the presence of the defendant; nor is it supplied by shewing that all the proceedings passed in one day.

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Per Curiam. It is all stated as one continuing transaction before the justices on the 4th of *June* 1805, when the conviction took place. After stating the defendant's appearance to the summons on the 4th of *June, now here before us,* &c. it proceeds, " we, the said justices, do *now here* proceed to examine, &c. and thereupon *on the day and year last aforesaid,* &c. the witnesses *now here* come before us, &c. and depose," &c. The Court will not intend a departure of the defendant where the whole is stated as one continuing transaction.

3d objection re-stated. The witnesses are stated to have been heard on the *day and year last aforesaid.* Now the *day last aforesaid* is the 4th *of June,* but no year is mentioned there.

Per Curiam. The only year before mentioned is 1805. It appears to have been after the information exhibited in *May* 1805, and it must have been before the signing and sealing the conviction, which was on the 4th of *June* in the same year.

The same objection was afterwards urged in another shape, that it did not appear with certainty on what day the conviction took place; for it might be drawn up and signed and sealed in form at any time subsequent; and therefore the date at the end did not necessarily shew that it took place at that time. To which the same answer was given by the Court as last mentioned.

4th objection. The evidence does not prove an offence within the statute. The offence is the *wetting,* &c. of *corn and grain* making into malt, in a state of operation, within twelve days after

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after it is taken from the cistern used for steeping it. The evidence is that the witnesses found *a floor of malt in operation* very wet, which had been watered * within four days after it had been taken from the cistern. But *corn or grain making into malt* is not *malt:* and in *s.* 31. of the act there is a distinct penalty for wetting *malt* before delivery to the brewer: and the duty is on the malt in its finished state. At least it should have been stated that it was so wetted before it had been taken twelve days *out of the cistern used by him for steeping it.* Whereas it might have been in operation *for brewing*, and have been taken out of the cistern used by him *for brewing*.

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Per Curiam. It is stated to be a floor of *malt in operation*, which implies that it was not finished. This is the language of the witness, which must have a reasonable intendment, and is to be understood according to common parlance and the general understanding of mankind: according to which the language used is certain enough. If a witness were to give evidence of a prisoner's *colouring a shilling*, upon an indictment on the stat. 8 and 9 *W.* 3. *c.* 26. it might equally be objected that the base blank was not *a shilling;* nor is it so, yet the evidence would be perfectly intelligible and relevant to the charge. If indeed it could have been shewn that there was any way in which *a floor of malt* could be *in operation* for any other purpose than that of making into malt, a doubt might have been thrown upon it; but none such can be suggested.

5th objection. The evidence does not prove the defendant to have been *a maltster* at the time of the offence alleged to have been committed. The witness only says that the defendant *is* a maltster. That must refer to the 4th of *June* on which the witness was examined; but non constat that the defendant was a maltster on the 12th of *May*. And this is not supplied by the witness saying that he went to the *malt-house of the defendant* on the 12th of *May:* for a man may have a *malt-house* and yet not be a *maltster;* or he may have a building called *the malt-house;* or it might be his malt-house in the occupation or possession of a tenant or other person. It is not even stated that the *malt* or the *cistern* belonged to the defendant.

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The Court said they would hear the prosecutor's counsel on this objection.

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Frere, in support of the conviction, contended that the defendant appeared to have been a maltster at the time of the offence committed, 1st, by reference to the information where the fact is so alleged, and which is connected with the evidence by the relative word *said*, (that the *said* defendant is a maltster, &c.,) and he cited *Rex* v. *Tucke*, (*a*) where, in a conviction on the stat. 6 & 7 *W.* 3. *c.* 11. for profane cursing, the information stated, that the defendant on such a day, adtunc existens *generosus* et *ultra ætatem sexdecem annorum* did on the same day profanely swear, &c. And the witness deposed that the *said defendant*, on the said day, swore, &c. And one of the objections was that the statute making a difference in the punishment according to the degree and age of the offender, the witness ought to have proved that he was a *gentleman*, and *above* 16 *years of age*. But the Court were of opinion, that this sufficiently appeared by the "*predictus* defendens," which referred to the person so described in the information. So *maltster* is a descriptio personæ in the information, to which the witness must be supposed to refer by the word *said*. 2dly. It must necessarily be collected from the evidence stated, that the defendant was a maltster at the time of the offence committed; for the witness, an excise officer, says that he *surveyed the defendant's malt-house* on the 12th of *May*, and found a floor of malt in operation, &c. Now the defendant could not have had a *malt-house* in which malt was in operation without being a maltster; nor could the officer have *surveyed* it (which is a technical phrase) unless it were first *entered* by the defendant as a *malt-house*. And he added, that it was a novel doctrine to require such extreme nicety in setting out the evidence in convictions, the true object of requiring which was, that the witness should not be made to swear to the law; but if his language were intelligible to the magistrates at the time, and they draw the conclusion of guilty from it, it was sufficient; and credence ought to be given to the justness of their conclu-

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(*a*) *Ld. Raym.* 1386. The same case is reported in 1 *Salk. Cas.* 351. and 8 *Mod.* 366. which latter book says that since the defendant was charged with *two shillings* for every offence it should be intended that he was a *gentleman*, if so charged by the informer; and that it should also be intended that he was *of age*, if so charged by the informer.

sion,

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sion, which it is within their province to make, (*a*) unless the contrary expressly appeared. It is more like a demurrer to evidence than a special verdict. Here the defendant being present at the time and hearing the evidence, it was competent to him, if he had not been a maltster at the time of the offence committed, to have stated that by way of defence when called upon; and not having done so, the fair conclusion from the whole of the evidence was, that he was then a maltster.

Abbott, in reply, said that the case of *Rex* v. *Tucke* stood alone: for that where the degree, description, or age of the [397] party was a component part of the offence, it was as necessary to be proved, to sustain a conviction, as any other independent fact: though it might be otherwise where it was only stated by way of addition, pro formâ. That the witness did not prove that it was an *entered* malt-house; still less that it had been so entered *by the defendant*. And the mere term *surveyed*, which was in common use, and not confined to a technical sense, did not necessarily imply that the malt-house had been *entered by the defendant*, and could not have supplied the want of finding such a fact in a special verdict.

Lord ELLENBOROUGH C. J. (after expressing great doubt of the case of *The King* v. *Tucke*, particularly as to making any intendment as to the party's age, without evidence of it, merely by the reference from the word *prædictus* to the allegation in the information; though he inclined to think that the addition of *generosus* might be so adopted into the evidence;) upon the second ground, said, If any material fact were wanting in the evidence to make out the charge, I should be very unwilling to supply it by intendment; but taking the whole of the evidence together, it does sufficiently appear that the defendant was a maltster at the time of the offence committed. All the difficulty arises from the order in which the evidence was taken down. The witness begins by stating that the defendant *is* a maltster; which would refer to the time he is speaking, viz. the 4th of *June*. But, without adverting to that, see how the evidence would stand without it. The witness then deposed

(*a*) *Rex* v. *Smith*, 8 *Term Rep.* 588.

that

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that *on the 12th of May* he *surveyed* the *malt-house of the defendant*, and found a floor of malt in operation, &c. Now it could not be then the defendant's *malt-house*, nor * could the officer then have *surveyed* it, unless *the defendant* had *entered* the malt-
*[398] house *as a maltster:* it would otherwise have been miscalled the defendant's *malt-house*. The term *survey* too is used in the malt acts; and I believe that the officer has no authority to survey a malt-house unless it be entered as such. (*a*) And this, it must be remembered, is the language of the excise officer who is relating what he did in the course of his duty as such officer; and the evidence given by him naturally imports that the malt-house of the defendant, which he surveyed, belonged to the defendant in the character of maltster.

GROSE J. I doubted at first whether it sufficiently appeared upon the face of the conviction that the defendant was proved to be a maltster at the time of the offence committed: but I think we must understand the language of the witness as it would be understood by common men; and a common man would understand from the words used by the witness, that the defendant was a maltster on the 12th of *May*, when the witness as an excise officer, *surveyed his malt-house;* and that, I think, is the fair import of the evidence.

LAWRENCE J. I must own that I have great doubts whether the fact of the defendant's being a maltster at the time of the offence alleged to be committed sufficiently appears. I have always considered that in these summary convictions the evidence necessary to support the charge ought to be precise; and it is not usual to have recourse to inference, in order to support a conviction. There must be some mistake in the report of
[399] *Tucke*'s case in Lord *Raymond;* for it is clear that the defendant's age ought to have been proved; for his being above 16 was an ingredient in the offence created by the statute; and it has been the constant practice of the Court to quash convictions if not supported by the evidence stated. Now supposing the evidence given here, to which it is said that our attention is to be confined, had only been that the officer *surveyed* the *de-*

(*a*) This was so stated at the bar.

fendant's

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fendant's malt-house; can we infer merely from the word *survey* the malt-house *surveyed* was a malt-house *entered by the defendant*, and that he was a *maltster* at the time? This, I think, would be going further in support of a conviction than any case has yet gone the length of.

LE BLANC J. It is clear that the evidence need not be given in any precise technical form of words. It is sufficient if we collect from the plain import of the language used that the offence charged was proved. The evidence, it must be remembered, is given in the presence of the defendant. The witness is an excise officer, who naturally gives his evidence in the language appropriate to his situation. He states that he *surveyed* the *malt-house of the defendant* on the said 12th of *May*, and found a *floor of malt in operation*, &c. And the question is, whether the magistrates are not primâ facie to collect from this evidence that the defendant was a maltster at that time? There is no contradiction to this. And if it were sufficient primâ facie evidence from whence the magistrates might collect that fact, it is sufficient to warrant the conviction.

Conviction affirmed.

HORN-

1806.

Saturday, April 26th.

HORNCASTLE and Others *against* SUART.

Where a ship was chartered on a voyage from *London* to *Dominica* and back to *London*, at a certain rate of freight upon the outward cargo; and after delivering her outward cargo at *Dominica*, the charterers were to provide her a full cargo homeward at the current freight from *Dominica* to *London*, &c.: held that an insurance by the owner of the ship on the freight *at and from Dominica to London*, attached while the ship lay at *Dominica* delivering her outward cargo, and before any part of the homeward cargo was shipped during which time she was captured by an enemy; the contract of affreightment by the charter-party being entire, and the risk on the policy having commenced.

THIS was an action on a policy of insurance on freight of the ship, *The Marquis of Lansdown*, "*at* and from *Dominica*, and all or any of the *West India* islands (*Jamaica* and *St. Domingo* excepted) to *London*," warranted to sail on or before the 1st of *August* 1805. The declaration, after stating the policy, which was in the usual form, alleged that before the making of the policy the Plaintiffs, by a charter-party of affreightment, of the 25th of *August* 1804, chartered the ship to *Urquhart* and *Hope*, for a voyage *from London to the island of Dominica, and back to London*, upon these amongst other terms and conditions, That the master should take on board in the river *Thames* all such goods as the freighters could procure on freight for *Dominica*, &c. and, as soon after the 1st of *October* 1804 as required by the freighters, sail with the first *West India* convoy to *Dominica*, and there deliver her outward-bound cargo, and take on board at *Dominica*, from the correspondents of *Urquhart* and *Hope*, a full cargo of *West India* produce *at the current freight for London*, and so loaded, proceed with the *May* convoy for *England*, provided the ship should have arrived at *Dominica*, and ready to discharge 90 days previous thereto. And *Urquhart* and *Hope* thereby agreed to pay the plaintiffs half of the net freight which the ship should make outwards, provided such net freight should exceed 1000*l.* but if it did not amount to 1000*l.* then they should pay the plaintiffs 500*l.* And *Urquhart* and *Hope* also bound themselves to procure for the ship at *Dominica* a full cargo *at the current freight for London*, and to dispatch her * homeward by the *May* convoy, if she arrived there and ready to discharge 90 days previous to the sailing of the said convoy, &c. But if the ship sailed with the *May* convoy, and was not fully loaded, after having arrived as before specified, then the freighters agreed to pay the owners dead freight for the deficiency; and if she was detained after the *May* con-

1806.

HORNCASTLE *against* STUART.

voy through default of the freighters, they agreed to pay the owners 10*l.* a day demurrage until the sailing of the next convoy, &c. The plaintiffs then averred that after the making of the charter-party, the ship took in her outward-bound cargo on freight for *Dominica*, and sailed within the time required from the river *Thames* for *Dominica*, and arrived there on the 6th of *February* 1805, and delivered her outward cargo, except such part as was necessary and customary to keep on board until some part of the homeward cargo should be loaded. That after the arrival of the ship at *Dominica*, the correspondents of *Urquhart* and *Hope* had procured a full cargo of *West India* produce to load the ship on freight from thence to *London*, which cargo, at the time of the loss after-mentioned, was there ready to be loaded on board the ship, but that before she could take any part of the homeward cargo on board, and while she lay at *Dominica*, and before the sailing of the *May* convoy, she was on the 22d of *February* 1805 captured by the enemy.

At the trial before Lord *Ellenborough* C. J. At Guildhall, the policy and charter-party, which appeared to have been made as stated in the declaration, were proved; and that the ship having sailed on the voyage described arrived at *Dominica*, and unloaded great part of her outward-bound cargo, but before she had taken in any part of her homeward-bound cargo was captured there by the *French* on the 22d of *February* 1805. Whereupon it was objected that the policy on the freight homewards did not attach, inasmuch as no part of the homeward cargo was laden on board, from which time only the risk commenced. And it was endeavoured to distinguish this case from *Thompson* v. *Taylor*, (*a*) where the insurance was on a *valued* policy on freight on a chartered ship *at* and from *London* to *Teneriffe*, and at and from thence to the *West Indies;* and which it was said turned out on the entirety of the voyage insured; the freight being covenanted to be paid for the said voyage according to a stipulated rate per pipe for 500 pipes of wine: whereas this was an open policy, and the freight was to be estimated according to the quantity of goods on board; of which there never were any, and therefore no inception of the freight, and consequently not of the insurance on it. And this, it was argued, was the

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(*a*) 6 *Term Rep.* 478.

same

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HORNCASTLE *against* SUART.

same as if the ship had sailed from *Dominica* without any goods on board. Lord *Ellenborough* C. J. however, overruled the objection, thinking the case was governed by *Thompson* v. *Taylor*, and that the existence of the charter-party giving an entirety to the contract of freight was decisive; the voyage having once commenced. The plaintiffs accordingly recovered a verdict.

Garrow now moved for a new trial upon the same grounds of distinction before taken between this and the former case. But

Lord ELLENBOROUGH C. J. said, that it was clear that the [403] under-writer was liable upon the authority of *Thompson* v. *Taylor*; the voyage having commenced in which the freight was to be earned according to the terms of the charter-party, which, made it one entire contract, and which voyage was insured by the policy. That in *Thompson* v. *Taylor* the loss happened before the ship arrived at *Teneriffe*, where she was going to fetch her freight, and yet the under-writer was holden to be liable. The other judges concurring,

Rule refused.

END OF EASTER TERM.

C A S E S

ARGUED AND DETERMINED 1806.

IN THE

COURT OF KING'S BENCH,

IN

Trinity Term,

In the Forty-sixth Year of the Reign of GEORGE III.

ROBERTSON *against* PATTERSON.

Friday, June 6th.

The defendant, a seaman, being out upon bail on process for a debt under 20*l.* was impressed into the king's service; and as he would have been entitled to his discharge, if in custody, by virtue of the stat. 32 *G.* 3. *c.* 33. *s.* 22. the Court, on application of the bail, ordered an *exoneretur* to be entered on the bail-piece in the first instance.

THE Defendant, being a seaman, was arrested at the suit of the Plaintiff for a debt of 17*l.*, and bailed; after which he was impressed into his majesty's service, where he is still retained. In the last term the defendant's bail applied to a Judge in court for a habeas corpus, directed to the commander of the ship on board of which the defendant was after he was impressed, to bring him up, for the purpose of being rendered in discharge of his bail; which was denied; and thereupon a rule nisi was obtained for entering an exoneretur on the bail-piece, on the ground that by act of law the bail were rendered incapable of taking the body of the defendant for the purpose of rendering him, and therefore ought not to be prejudiced; and that if he had been in the service at the time he could not have been arrested for a debt of 17*l.*

Lawes now shewed cause, and argued the case first on general grounds, that the bail had by their recognizance, undertaken at all events to render the body of the defendant or pay the debt,

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ROBERTSON *against* PATTERSON.

debt, &c.; and the plaintiff ought not to be prejudiced by the exercise of a prerogative to which the bail knew that the defendant was liable at the time when they became bail for him, and which could not have been exercised if the defendant had remained in custody. That this distinguished the case materially from cases under the alien act, (*a*) where an ex post facto law had rendered the bail incapable of performing the condition of their recognizance, by enabling the king to send the defendant out of the kingdom; and which would have operated on him if he had remained in custody. But here non constat that the defendant might not be at large again before the bail could be called upon; final judgment not having been yet signed. And the Court had refused to enlarge the time for bail to render their principal on account of the illness of the principal, whose life would have been endangered by the removal; (*b*) saying, that the inconvenience should rather be borne by the bail than by the plaintiff, who would otherwise be delayed of his right. 2dly, He relied on an affidavit which stated, that the bail had declared that they were indemnified, which fact in the cases under the alien act the Court had required the bail making the application to negative before they would grant the application. And the affidavit also stated, that after the defendant was impressed he had agreed to enter as a volunteer, and had received the bounty.

[407] Sir *V. Gibbs* and *Espinasse*, contrà, denied the fact of the bail being indemnified, of which they desired time to procure an affidavit, on the ground of surprize. And as to the defendant's having, since his being impressed, entered and received the bounty money, it could not, they said, vary the condition of the bail. On the general ground they relied principally on the stat. 32 *G.* 3. *c.* 33. *s.* 22. which enacts, that no seaman, &c. on board any of his majesty's ships *shall be liable to be taken out of the king's service by any process or execution whatsoever* (other than for some criminal matter,) unless such process or execution be for a real debt contracted by such seaman, &c. when he did not belong to any ship in the king's service, or other just cause of action, &c. *to the value of* 20*l. at the least*, &c.

(*a*) *Merrick* v. *Vaucher*, and other cases of the same sort, 6 *Term Rep.* 50. 52.

(*b*) *Wynn* v. *Petty*, 4 *East*, 102.

And

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And if any person be arrested, contrary to the intent of this act, it enables any Judge of the Court, on application, to discharge him. It appears from thence, that if the defendant had been rendered in discharge of his bail it would have been a nugatory act, as he would the next moment have been entitled to his discharge: and as the defendant cannot now by law be taken out of the king's service, the bail ought not to be prejudiced; but the Court will at once enter an exoneretur on the bail-piece upon the same principle as in the case of one out upon bail who becomes a peer. (*a*)

Lord ELLENBOROUGH C. J. at first suggested what might be considered as the relative situation of the defendant and his bail in respect of the Crown. That the bail being the manucaptors of the defendant had a right to retake him while he was at large; and the Crown also had a right to his personal [408] service as a seaman. That if the bail were desirous of exercising their right of caption, they should have done so before the Crown interposed and acquired by the impressing of the defendant a possessory right, as it were, to his person: and that that possessory right could not be devested by any ex post facto act of the bail. That here therefore the crown had acquired by act of law a right to the defendant's person paramount the right of the bail to take him.

Afterwards all *The Court*, upon consultation, agreed that as the granting a habeas corpus to bring up the defendant for the purpose of being rendered by his bail would only be going through a circuity of delay and expence, which could answer no purpose whatever to the plaintiff, as the defendant would be immediately entitled to his discharge under the provisions of the stat. 32 *G.* 3., by which no seaman could be taken out of the king's service by any process, &c. for a debt to any amount contracted after he was in the service; nor by any process, &c. for a debt under 20*l.* contracted before he was in the king's service; which latter was the present case: (and in that respect the case was assimilated to *Bond* v. *Isaac*, (*b*) where such a course was taken:) therefore they thought it was more consonant to sound sense at once to enter an exoneretur upon

(*a*) *Trinder* v. *Shirley*, *Dougl.* 45. (*b*) 1 *Burr.* 339.

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the bail-piece, (*a*) without going through the forms of a habeas corpus, a render, and immediate discharge of the defendant. But before they made the * rule absolute, they required the bail to make an affidavit that they were not indemnified: and * [409] a satisfactory affidavit of this fact having been produced on a subsequent day,

The Court made the

Rule absolute.

(*a*) Vide *Wood* v. *Mitchell*, 6 *Term Rep.* 247. where this was done in the case of one under sentence of transportation for felony. But in *Sharp* v. *Sheriff*, 7 *Term Rep.* 226. where the defendant was in custody on a charge of felony, the court granted a habeas corpus to bring him up, in order that he might be rendered by his bail.

Saturday, June 7th.

BROWN *against* RAWLINS.

Where the tenants of a manor formerly belonging to a monastery, holding *by border service, and the defence of Tynemouth castle*, under *copy of court-roll*, and whose estates passed *by surrender and admittance*, shewed in evidence by surrenders as far back as they existed in writing: by admissions from the 17th of *Eliz.* to the 14 *Car.* 1.; by exchequer decrees between the lords and tenants in the times of *Eliz.* and *Jac.* 1.: and by an inquisition of the jury at the court baron of the lord in the 2 *Jac.* 2.; that they were *copyholders of inheritance*, with *fines certain*, holding *according to the custom of husbandry of the manor* (or *according to the custom of the manor* generally) without stating them to hold *at the will of the lord*: admitting this evidence to outweigh proof of ministers' accounts in the 30th and 31st *Hen.* 8.; a grant of the manor from the crown in the 9th *Car.* 1. including these estates under the name of *tenements of husbandry*; subsequent mesne conveyances reserving the coal mines, &c. in certain districts; and admissions from 1663 to 1777 (including admissions of the several tenants to the estate immediately in question) in all which they were stated to hold *at the will of the lord* as well as *according to the custom of husbandry of the manor*, &c.: Yet as there was evidence for more than a century past that the lord had leased the coal and limestone under the copyhold lands in different parts of the manor, and had received rent for the same; and that the lessees of the lord, and not the tenants, had taken the coal and limestone; held that such acts of ownership explained the nature of the tenure *according to the custom of husbandry of the manor*, &c. and shewed in aid of the other evidence, that the *freehold* was *in the lord*, and not in the tenants. And at any rate the evidence preponderating so much in favour of the lord, the Court would not disturb a verdict given for him.

THIS was an action of trespass for breaking and entering the Plaintiff's close, in the township of *Backworth* in the county of *Northumberland*, part of a farm there called *Lowstead*

Farm,

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Farm, and making trenches and pits in the soil. The Defendant pleaded, 1st, not guilty, to the force and arms. 2dly, To the residue of the trespass, that the locus in quo was the *close, soil, and freehold* of the Duke of *Northumberland*, as whose servant the defendant justified. 3dly, To the same residue, that the Duke was seised in fee of the manor of *Tynemouth*, or *Tynemouthshire*, whereof as well the locus in quo as other land in *Backworth* was and immemorially had been *parcel* and a *copyhold* tenement of the manor, demised and demiseable by copy of court-roll by the lord or his steward in fee-simple or otherwise *at the will of the lord*, according to the custom of the manor; and that the Duke, being so seised of the manor, was by reason thereof *entitled to all mines and veins of coal* in and under the locus in quo, and to bore for, dig for, and get such mines and veins of coal: wherefore, the defendant, as servant to the Duke, entered and dug, &c.; and so justified the trespasses. Replication, to the plea of soil and freehold, alleging by way of inducement Sir *M. W. Ridley*'s seisin of the locus in quo, parcel of a customary tenement holden by copy of court-roll of the same manor in his demesne as of fee, according to the custom of the manor, and a demise by him to the plaintiff; traversed the allegation of soil and freehold in the Duke. To the last plea; after a similar inducement, the replication traversed that the locus in quo and the other land were and immemorially had been *parcel of a copyhold tenement* of the said manor demised and demi-cable by copy, &c. by the lord or his steward, in fee simple or otherwise *at the will of the lord*, according to the custom of the manor, as in the last plea alleged. The rejoinder took issue on each of the traverses.

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At the trial before *Chambre* J. at the last summer assizes for the county of *Northumberland*, the contention between the parties was as to the nature of the tenure of the plaintiff's estate, whether *copyhold* or of the nature of copyhold, as contended for by the Duke, who claimed a right to enter and dig for coal: or *freehold*, or *customary freehold*, as contended for by the plaintiff, who was tenant to *R. W. Grey*, Esq., and resisted the Duke's claim.

The defendant, who took the affirmative of the issues, gave the following evidence: 1. An examined copy of the inrolment of letters patent of 16th of *May*, 9 *Car.* I., whereby the Crown granted

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Evidence for the lord.

1. *Letters patent*, 9 *Car.* I.

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granted the manor of *Tynemouthshire* in fee to *W. Scriven* and *P. Eden*, Esqrs., with all its rights, members, and appurtenances, and all its lordships, manors, townships, &c. tenements, tithes, and hereditaments, in *Preston*, &c., *Bakeworth*, &c. late parcel of the possessions of the late monastery of *Tynemouth*, to wit, &c. (enumerating the particulars; amongst which *Bakeworth*, called *Backworth* in the declaration, is thus described;) "and all those *ten tenements of husbandry* with their appurtenances in *Bakeworth*, now or late in the several tenures or occupations of *G. W.*, &c. or of their assigns, *at the will of the lord*, by the particular thereof mentioned to be of the annual rent or value of 10*l.*, and all that garden with the appurtenances in the tenure of all the tenants there *at the will of the lord*, by particular thereof mentioned to be of the annual rent or value of 20*d*; and all the tithes of hay of the said township, &c. and pannage of hogs, and also all those 25 qrs. of wheat and 10 qrs. of oats annually coming of the rent of the said *ten tenements of husbandry* in the *township of Bakeworth* annually to be delivered, lately demised to *Henry* Earl of *Northumberland*, by the particular thereof mentioned to be of the annual rent of 48*l.* 10*s.* 8*d.*" The greatest part of the tenements enumerated in the other districts, is in like manner described as *tenements of husbandry, at the will of the lord*; and the whole is said to be parcel of the possessions of the late monastery of *Tynemouth*. On the 2d of *August* in the same year these premises were conveyed, by bargain and sale inrolled, by *Scriven* and *Eden* to *Taylor* and *Cartwright* in fee, *with an exception of the mines and veins* [412] *of coal* in certain parts, (not including *Backworth*) and the rents arising therefrom. And on the 16th *March* 1640, by another bargain and sale, the same were conveyed by *Cartwright* and *Taylor* to *Algernon* Earl of *Northumberland*, with the further *exception of a coal-mine* in another of the parts, which the Earl and the bargainors had sold to *Read* and *Milburn*. 2. An examined copy of the ministers' accounts for the monastery of *Tynemouth* from *Mich.* 30 *H.* 8. to *Mich.* 31 *H.* 8. (an. 1538—40.) The part relating to *Backworth* is the account of *T. D.* the collector of the rents there. Under the head of "*husbandry rents*," it describes the tenements out of which they issue as being "*at the will of the lord*." The amount of the rents corresponded with the letters patent 9 *Car.* 1., as did most of the sirnames of the

and conveyances under it.

2. *Ministers' accounts.*

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the different persons in whose tenures the respective *tenements of husbandry* were alleged to be. 3. The rolls of the manor of *Tynemouth*. These were produced out of the *Evidence Room* at *Alnwick Castle*. An entry was read in 1663 of a presentment by the jury of a surrender by *O. Ogle* of a *customary tenement* in *Backworth* within the manor, to the use of *R. Grey* sen. (ancestor of the plaintiff's lessor) and his heirs; whereupon the said *R. Grey* came into court and demanded to be admitted tenant, to whom the lord, by his steward, granted seisin. The habendum to *Grey* and his heirs, *at the will of the lord, according to the custom of the manor*, under the rents, &c. The oldest admittance rolls were in 1662. Several admissions were read 18th *April* 1677. It is found by the homage, that *R. Grey*, of *Newcastle*, a customary tenant of the manor died seised of 6 several customary tenements in *Backworth*, and that *R. G.* is his son and next heir, to whom the lord, by his steward, grants seisin of the said *customary tenements, habendum to him and his heirs at the will of the lord, according to the custom of husbandry* of the manor, rendering, &c. Two other similar admissions in 1679 of different tenants of different customary tenements in *Backworth*. Another similar one in 1684. Another admission in 1684 of *J. Ogle*, as next heir on the deaths of *O.* and *L. Ogle*, where the habendum is to him and his heirs *at the will of the lord, according to the custom of the manor*, (not calling it *the custom of husbandry*.) 17th *October* 1687, it is found by the homage that *R. Grey*, of *Backworth*, Esq., a customary tenant of the manor, died seised of 6 customary tenements in *Backworth*, and of others, &c.; and that *R. G.* of *Backworth* is his son and next heir, &c. to whom the lord, by his steward, grants seisin; habendum to him and his heirs, *at the will of the lord, according to the custom of husbandry of the manor*, rendering, &c.; and he is admitted accordingly. 25th *April* 1771, it is found by the homage (*R. W. Grey*, Esq. the plaintiff's lessor being upon the homage) that *E. C.* and Sir *R. B.* with Mr. *Grey*'s privity and direction, had surrendered out of court a moiety of a *customary or copyhold tenement*, in *Backworth*, to which *E. C.* and Sir *R. B.* had been admitted in 1760, on the surrender of the said *R. W. Grey*, to the use of *M. Bell*, Esq. according to the custom, upon trust; to whom seisin is granted; the habendum being in the same form as the last preceding; and he is admitted. There were

3. *Rolls of the manor.*

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two

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two other similar admissions of Mr. *Bell* as a trustee at the same court, on surrenders made by different trustees of Mr. *Grey*; and these three admissions comprehended the whole township of *Backworth*. 17th *April* 1777, the homage (Mr. *Grey* being again named as one) find a surrender out of court by Mr. *Bell*,

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with Mr. *Grey*'s privity and direction, of the different tenements to which Mr. *Bell* had been before admitted, (describing them;) which surrendered premises consist of *ten customary or copyhold tenements or farmholds* in the said township of *Backworth* (being the whole of the township, &c.) to the use of Sir *M. W. Ridley* and *C. Brandling*, Esq. and their heirs; and seisin is granted to them; with the habendum, &c. in the same terms as in the admissions of 1687 and 1771. 4. It was proved by one who had been bailiff of the manor from 1782, *that no copyholder in any part of the manor of Tynemouth had ever gotten or bored for coal in his own copyhold*; and that he had never prepared any licences for copyholders to make waggon ways. And this was confirmed by another who had been colliery agent to the *Northumberland* family for 30 years; though Mr. *Grey* had tried 14 years ago for coal in his own freehold out of *Backworth*. As further proof that the tenure was not of a freehold nature, but copyhold at the will of the lord, the following evidence of enjoyment of the coals and other minerals in all the estates holden by copy of court-roll within the manor was given. 1. The counterpart of a lease of *June* 1700, whereby the then lord, in consideration of 1000*l*., and of 500*l*. secured to be paid as a fine, and of the rent, &c. reserved, demised to *J. Atkinson* all the coal-mines, coal-pits, collieries and seams of coal, as well opened as not opened, within and under, &c. *all the lands, grounds, and fields* within the township, territories, &c. of *Whitley*, (one of the townships within the manor) and the pier and watercourses, &c. made by a former tenant of the colliery for 21 years, paying 100*l*. rent whether the colliery should be wrought or not, and 10*s*. a fenn for all the coals gotten, &c.; with a covenant by the lessee to make satisfaction

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for any damage done to any of the tenants. 2. A renewed lease in *July* 1713 between the same parties for three years in addition. It was proved that the Duke had no freehold lands in *Whitley* except about 5 acres, and 40 acres of wastes by the sea shore. 3. The counterpart of a lease of *February* 1685 from the

4. *Acts of ownership, leases*, &c.

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the representative of the lord of the manor of *all the collieries and coal-mines, &c. within the lands and township of Earsdon, in the manor or lordship of Tynemouth,* for 21 years, rendering rent; with a like covenant from the lessee. It was proved that the Duke had no freehold in *Earsdon* distinct from his estate in the copyholds, and that there were no wastes there except the Lanes. 4. The counterpart of a similar lease of *June* 1684 from the same representative for 21 years of a colliery *in Preston in the manor of Tynemouth,* formerly in the occupation of another tenant, rendering for rent 5*l.* a year and 5*s.* a fenn. There were proved to be no wastes in *Preston,* and no freehold but freehold houses, and a freehold close adjoining. The receiver of the Duke's colliery rents proved the receipt of rent for a coal-pit in *Morton,* within the manor, which was in copyhold land. Coal and lime were also proved to have been wrought in *Whitley* by Mr. *Hudson,* and a lease was proved of *September* 1785, executed by both parties, whereby the Duke upon the surrender of a former lease made in 1763 demised to *H. Hudson,* of *Whitley,* for 12 years, *all the limestone quarries, as well opened as not opened, within or under the copyhold lands of the said H. Hudson,* called *Whitley Park* in the townships of *Whitley* and *Monkseaton,* within the manor of *Tynemouth,* commonly called *Whitley* limestone quarries, with liberty to break ground, and dig and win limestones: subject to an *exception* and *reservation* to the Duke and the person for the time being entitled to the freehold and inheritance of the manor of *Tynemouth of all other mines, minerals, and coals within or under the said lands and grounds;* and liberty to the Duke, &c. during the term to enter the said lands, to dig, try, and search for any of the said reserved mines, minerals, or coals, and carry away the same, &c. yielding and paying to the duke, &c. a yearly rent of 250*l.*; and *Hudson* also covenanted to supply the duke's tenants at rack-rent and the copyholders with limestone to be used on their estates at limited prices; and on the determination of the term, to convey, surrender, and assure to the Duke, &c. and their heirs, 13 lime kilns, then erected on the premises, with power to use the same, and to lead coals, &c. by the roads then used for leading lime, &c.; and rent was proved to have been received by the Duke under this lease for 24 years.

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Case of the plaintiff, the tenant

On the part of the plaintiff it was contended, that the customary estates, though they pass by surrender and copy of court-rolls, were not *copyholds at the will of the lord*, but *estates of a freehold tenure:* and the case of *Gale* v. *Noble* (*a*) was cited to prove that estates were not copyhold unless it appeared by the rolls that they were granted *at the will of the lord.* And it was said that though no instance in the existing rolls of admission appeared wherein they were granted otherwise than at will, yet that all those admissions were erroneous, not pursuing the terms of the surrenders, wherein the words, "*at the will of the lord,*" were uniformly omitted; and that it would appear by copies of older admissions, that those words were not inserted, and by those and other evidence, that they never ought to have been inserted in the later admissions. The evidence was as follows: 1. A copy of a decree of 14th *April*, 19 *Eliz.* in the exchequer; *Milbank and Others* v. *Dallaval and Others*, the queen's farmers; wherein the plaintiffs state themselves and their ancestors to have been immemorially seised of tenements in *Backworth*, and six other townships, which they some time held of the prior of *Tynemouth*, and, since the dissolution, of the queen, *by copy of court-roll, according to the custom of the manor of Tynemouth, paying their rent*, doing their *service on the borders*, and *in defence of Tynemouth castle* from invasion at their own charges. That long before the dissolution there was a composition between the prior and the tenants, that the tenants and their heirs should for their ease pay a yearly proportion of corn for half of the rent of their tenements by *Winchester* measure, &c. The rest relates wholly to a dispute as to the measure of the corn, whether by *Winchester* or *Newcastle* measure; and the decree is only that they shall pay by *Winchester* measure. 2. A copy of an inrolment of a decree of 25th *April*, 8 *Jac* 1. in the Exchequer; which recites that *Anderson* and others, the king's *customary and copyhold* tenants, within *Backworth* and other enumerated townships, all parcel of the king's manor of *Tynemouth*, for themselves and the residue of the tenants, had petitioned the king, *affirming*, that they were *copyholders of inheritance* of several messuages, lands, and tenements, within the said townships, and had been and were seised thereof of several estates of inheritance, according to the custom of the manor.

Evidence.

1. Exchequer decree of 19 Eliz.

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2. Exchequer decree, 8 J. 1.

(*a*) *Carth.* 432.

That

That there were *immemorial customs* within the manor for *payment* of *fines for admittances* to the said *copyhold* tenements, holden by copy of court-rolls of the manor *secundem consuetudinem* HUSBANDRIÆ *of the said manor*, upon descent, surrender, and alienation. They then set forth the amount of the different fines, being *fines certain*, and pray relief of wrongs done by inferior officers, &c. That by reference (*a*) from his majesty, the petitioners were called before the lord high treasurer, and the chancellor and barons of the Exchequer, to shew how they maintained their customs for such *estates of inheritance*, and for the *certainty of their fines:* that the petitioners, after advising with their counsel, persisted to maintain their copyhold estates of *inheritance* and *custom* for such *certain fines*, and besought the Court therein; as also for that by reason of some *difference of late* times in the *forms of their surrenders and admittances*, far differing from their *ancient* precedents, and also in the *assessing* of their *fines*, as well by ignorance of the tenants, as also sometimes by the corruption of the deputy stewards, &c. which might be prejudicial to their posterity, if not reformed: and in respect the ancient court-rolls and evidences for proof of the said *estates of inheritance* and the *certainty of their said fines* were then lost, though otherwise evident by testimony of ancient men; that they might receive the benefit of the king's pleasure, touching the confirmation, &c. of their said copyhold estates of inheritance and ancient customs, and for *reducing their copies, surrenders*, and *admittances to their ancient form*, &c. And thereupon the lord treasurer, chancellor and barons, *gave order*, that seeing the *court-rolls* could not be found, the ancient and late *copies*, and whatever testimonies for approving the said *estates of inheritance* and the *certainty of the said fines* could be shewn by the tenants, should be examined: and as it appeared to the Court by the examination, &c. of the customs, copies, and testimonies, &c. *that the copyholders were copyholders of inheritance*, and that the *ancient customs* for *payment of fines* within the said townships, parcels of the manor, *were, and anciently had been,*

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(*a*) Vide *post stat.* 7 *Jac.* 1. *c.* 21. (from *Rastall's* edition of the statutes,) under the authority of which this reference appears to have been made, and which establishes the copyhold tenures and customs to be decreed during a given term under such references.

such

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such as the tenants had alleged: therefore, on the behalf of the petitioners and the rest, who had freely given security to pay 789*l.* 13*s.* 4*d.* to the king, and desired that they and the rest of the customary and copyhold tenants for better satisfaction, evidence, and declaration of their ancient rights and customs might have some record thereof made in court, &c. It was decreed that the said ancient rights and *customs* of the said townships for their said *estates of inheritance and certainty of fines* were true; and that the copyholders *were and always had been copyholders of inheritance*, and so from thenceforth should be, &c. And that the petitioners, and all other his majesty's *copyholders* in the said townships, should from thenceforth have, hold, and enjoy to them and their heirs the said tenements, &c. *as copyholders or customary tenants* thereof accordingly. The decree then proceeds to confirm the usage as to the *quantum of fines* on descent, surrender, or alienation. In stating the fines in *Backworth* and six others of the townships wherein the quantum is alike, the word *freehold* is once used in the description of the tenants' estates, but occurs no where else in the decree. It is thus introduced, "that every tenant holding in present possession, *as of some estate of* FREEHOLD *or inheritance* of the said manor, by copy of court-roll, &c. shall pay," &c. where, (as the learned Judge who tried the cause observed in his report) the word *freehold* seems used only to distinguish life interests from terms of years. The decree concludes with directing *that the forms of their copies, surrenders, and admittances, should be according to the precedents* [420] *most commonly used before the 20th of Eliz.* and such fees and duties taken for the same as were lawfully used and taken before the said time, and none other nor greater. 3. An order of the Court of Exchequer in *E.* 12 *Jac.* 1. reciting part of the last decree relating to the forms of the copies; and that the Earl of *Northumberland*, the king's steward of the manor of *Tynemouth*, had *certified* the form of the copy annexed to the order, as the accustomed form of making the copies within the manor, on admission after death; on the motion of counsel for the tenants, it was ordered that the form of the copy should be entered in the book of orders after that order, and should stand as a precedent of copies thereafter to be made for such tenants of the manor as should be admitted after death. The form then follows, which after stating the stile of the Court, and the presentment

3. *Exchequer decree of* 12 *J.* 1. *giving form of copy.*

sentment of the death, and that *J. G.* was the son and next heir, and his appearance and prayer of admission, proceeds, "Cui dominus rex per senescallum suum concessit inde seisinam habendum sibi et hæredibus suis *secundum consuetudinem husbandriæ manerii prædicti* faciend: et reddend: redditum servicia et consuetudines inde prius debit: et consuet: et dat domino de fine, &c. fecit domino fidelitatem, et admissus est inde tenens, &c. 4. Copies of admissions from the muniments of Mr. *Grey* at *Backworth*. 14th *November*. 17th *Eliz*. At the Queen's Court at *Tynemouth*, &c. before *Thomas Bates*, surveyor of the queen's lands and others, *J. D.* is admitted to *a tenement of husbandry* in *Backworth:* the habendum is for life, *according to the custom of husbandry there*, (omitting *at the will of the lord.*) (Signed) *Northumberland.* Thomas Bates. There were similar copies of admissions of different tenants to different tenements, 10th *October*, 20th *Eliz.*; 23d *January*, 38 *Eliz.*; 15th *October*, 41 *Eliz.*; 3d *April*, 11 *Car.* 1.; and 22d *October*, 14 *Car.* 1.; habendum for life, or to the tenant and his assigns, or to him and his heirs, *according to the custom of husbandry of the manor*, or *according to the custom of husbandry there used*, or *according to the custom of husbandry*. In two instances, 10th *April*, 43 *Eliz.*, and 22d *April*, 4 *Car.* 1., it is *according to the custom of the manor:* in none of these instances is it said, *at the will of the lord*. 5. A petition (without a date) of several copyhold tenants within the manor to *Algernon* Earl of *Northumberland*, complaining that their copies were altered, and more than their customary fines required by his officers; and that some of the tenants had been denied their copies, though found heirs *according to the custom of the manor*, and notwithstanding they had paid and performed all rents and services then and formerly due and payable *according to the custom of the manor*, on pretence that they had *divided without license;* although the Earl's steward, who then declared he was one of the lords of the manor, did at court, upon application from some of the copyholders, bid them go on with the division in God's name; saying, that the next time he came he would grant them license for division: they therefore pray to have their copies as formerly, paying their certain fines, and have their said grievances redressed. This petition appears, by an order signed in the margin, "*A. Northumberland*, 29th *April* 1659,"

4. *Copies of admissions from muniments of plaintiff.*

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5. *Petition of copyholders to lord for redress of grievances.*

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6. *Presentment of customs.* 1685.

1659," to have been referred to certain persons; but nothing was determined by reason of the neglect of one of the referees. 6. 10th *March*, 2 *Jac.* 2. At the court baron of the Duke and Duchess of *Somerset*, for the manor of *Tynemouth*, the jury being charged *to enquire what were the customs of the manor*, and what duties, rents, and services were payable to the lord * for their *copyhold farms* in the several townships within the manor,

*[422] find *that all the copyhold estates within the manor were copyhold estates of inheritance according to the custom of the manor;* and that if any copyholder died seised, his widow should enjoy *the copyhold estate during widowhood* only by virtue of her husband's copy, without any fine, or taking any admittance. That on the death or marriage of the widow the copyhold shall descend to the copyholder's eldest son, who is to take a copy at the next court. Upon such admittance by descent to pay the lord 40*s.* for a whole *farm*, 20*s.* for a half farm, and 10*s.* for a quarter: if he die without issue, the second son to take a copy, and pay such fine as aforesaid; and so from son to sons: and for lack of sons, to the *eldest daughter* for life only, *paying* 4*l. for a fine of a whole farm*, and so proportionably: and so to descend and come to the next heir male in succession. The substance of the other findings in the presentment is, that on voluntary surrenders the fines are double the amount of those on descent. That on surrendering a close, parcel of a copyhold, but less than a quarter of it, the fine shall be as for a quarter, with an increase of 1*s.* upon the rent: if more than a quarter surrendered, the fine to be as for half a farm, &c. That if the part surrendered be a cottage or house, then the rent to be increased 1*s.* and a fine as for a quarter of a tenement: but if it be a mortgage surrender, and it be surrendered back to the mortgagor or his heirs, the increase of rent to cease; the full rent of the farm being preserved to the lord. In case of mortgage surrenders the condition to be indorsed on the surrender. Surrenders out of court to be before two of the homagers or customary tenants. That the copyholders *by the custom may let*

[423] *to farm their copyhold lands* to any tenant by indenture of lease for 3 years, without licence; and if for the term of 20 or 21 years, *then the copyholder ought to have a licence* from the lord's steward, paying his fee, without paying any fine to the lord. Surrenders to be presented at the next court; otherwise void.

7. It

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7. It also appeared by the testimony of a witness who had examined the book of surrenders, that the words "*at the will of the lord*" were not inserted in any of them. That the greatest part state the surrender to be "to the use of the surrenderee, *according to the custom of the manor*," and the others "*according to the custom of the husbandry of the manor*," without any reference to the will of the lord. One of those read was 26th *December* 1770; a surrender out of court by Mr. *Grey*'s said trustees, with his privity and direction, of the moiety of a *customary or copyhold* tenement or *farmhold* in *Backworth*, (to which they had been admitted on the 15th of *April* 1760,) on a surrender by Mr. *Grey* to the use of *M. Bell*, Esq. and his heirs according to the custom of the said manor, (making no mention of *husbandry* or *the will of the lord*,) in trust, &c. 7. *Surrenders.*

The case was left to the jury upon this evidence; and the learned judge observed to them, that he thought there was no weight in the plaintiff's objection that the *surrenders* did not specify the estates to be *at will;* that circumstance not being necessary to be stated in a surrender, whatever it might be in an admission. That in the suits between the lords and tenants, of which evidence had been given on the plaintiff's part, it did not appear to have ever been a question whether their tenements were *of freehold* or *copyhold tenure*, but merely whether they were *of inheritance* or not, and what were the fines and services to which they were liable; to which alone the alteration [424] in the copies, complained of in some of the proceedings, seemed to refer. That the language of the tenants themselves in those proceedings, where they described their tenure, seemed to import a mere *copyhold tenure;* as they uniformly styled themselves *copyholders* and *copyholders of inheritance*, without any qualification, or without any intimation of a *freehold* interest: and that in his opinion the evidence upon the whole preponderated much in favour of the defendant: for whom the jury found their verdict.

A rule was obtained in *Michaelmas* term last for a new trial, which came on to be heard in *Easter* term last, when *Cockell* Serjt., *Woode*, and *Raine*, were to have opposed the rule, but the Court desired to hear the counsel in support of it.

Park, *Topping*, and *Holroyd* argued in support of the rule, that the weight of evidence shewed that the freehold of these customary

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customary estates, and consequently the soil under the surface, was in the tenant and not in the lord. That it appeared from the various documents proved, that encroachments had been continually making by the lords' stewards upon the tenants. And that however the admittances, which were the acts of the lord, and framed by his officers, stated during some periods the tenants to hold *at the will of the lord*, yet that the surrenders, to which the admittances were merely consequential, (*a*) all expressed the holding to be either *according to the custom of husbandry of the manor*, or simply *according to the custom of the manor;* omitting the words *at the will of the lord;* and that the
[425] same appeared by the Exchequer decrees of the 19th of *Eliz.* and of the 8 *Jac.* 1. and 12 *Jac.* 1. and the presentment of the customs of the manor in the 2 *Jac.* 2.; shewing that, though sometimes called *copyhold* or *customary* tenants, as evidencing their titles by *copy of court-roll;* yet that their services were of a *military* nature, viz. *border service*, and the *defence of Tynemouth castle;* that their *fines* were *certain*, and that they held *estates of inheritance;* all of which are indicia of a *free* and not of a *base* tenure. And they relied principally upon the case of *Gale* v. *Noble*, (*b*) where it was resolved that lands, parcel of a manor, and passing by surrender and copy of court-roll, were yet *not copyhold*, but *customary freehold;* because it did not appear in any of the rolls or copies produced that they were granted ad voluntatem domini manerii, but only *tenendum secundum consuetudinem* manerii; and that too in a case where all the tenants had before constantly taken their estates to be *copyhold;* by which must be understood that they had called them *copyholds*. And by Lord *Hardwicke* C. in *Hussey* v. *Grills*, (*c*) customary freeholds and copyholds differ extremely in their nature; the latter are of a base nature, which customary freeholds never were. And they also said, that it had been admitted at the trial that Mr. *Grey*, the plaintiff's landlord, had built his present house in *Backworth* with stone which he had gotten

(*a*) Co. Copyh. 11. and *Roe* v. *Griffith*, 4 Burr. 1901.

(*b*) 4 Co. 22 b. This and all the leading cases on the subject are collected in the case of *Doe* d. *Cuddy* v. *Putland*, 3 Term, 51. and *Doe* v. *Danvers*, *ante*, 290. which were referred to.

(*c*) 2 Atk. 265.

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there. And that as to coal, there was no proof that either party had before gotten any there.

The case stood over for want of further time till this term, when

Lord ELLENBOROUGH C. J. (without hearing counsel against the rule) delivered the opinion of the court. After stating the pleadings, and that the real parties to the cause were Mr. *Grey* of *Backworth* on the part of the plaintiff, a tenant of the manor of *Tynemouth*, and the Duke of *Northumberland*, lord of the manor, on the part of the defendant; and that the question between them was, whether the soil and freehold were in the tenant, or whether the tenure were not copyhold, or in the nature of copyhold, and the freehold in the lord; he proceeded to state and comment upon the evidence reported by the learned Judge who tried the cause. And, first, as to the evidence adduced by the defendant: it appears by a copy of the inrolment of letters patent, 9 *Car.* 1. that the Crown granted the manor of *Tynemouthshire*, formerly parcel of the possessions of the late monastery of *Tynemouth*, in fee to *Scriven* and *Eden*, with all its rights, members, and appurtenances: and in the description of the premises are mentioned "all those ten *tenements of husbandry*, with their appurtenances *in Backworth*," then or late in the tenures and occupation of certain tenants by name; and there described to be holden "*at the will of the lord.*" And the greater part of the tenements in the other districts are described in the same manner as "*tenements of husbandry at the will of the lord.*" Next follow the conveyances in the same year by *Scriven* and *Eden* to *Taylor* and *Cartwright*, with an *exception* of the *mines and veins of coals* in certain districts: and in 1640 *Taylor* and *Cartwright* conveyed to *Algernon* Earl of *Northumberland* with a further *exception of a coal mine* in another district; which the Earl and the bargainors had conveyed away. The next piece of evidence is an examined copy of the *ministers' accounts* for the monastery of *Tynemouth* in the 30th and 31st. of *Hen.* 8., where in an account of the collector of the rents in *Backworth* under the head of "*husbandry rents*," the tenements out of which the rents issue are described as holden "*at the will of the lord.*" This is followed by an entry from the rolls of the manor of a presentment of a surrender in 1663 to Mr. *Grey*'s ancestor of a *customary tenement* in *Backworth*, and a grant

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a grant thereof by the lord, *habendum* to *Grey* and his heirs, "*at the will of the lord, according to the custom of the manor.*" And a similar description runs through all the other admissions in 1677, 1679, 1687, 1771, and 1777; the habendum in each being "*at the will of the lord*, according to the *custom of husbandry* of the manor," or "*at the will of the lord* according to the *custom of the manor.*" And this evidence not only applies to the usual manner of admittance of the tenants of the manor, but also in particular to the admission of Mr. *Grey* and those under whom he claims. It was also proved on the part of the lord of the manor, that there was no instance of a copyholder boring for coals under his own copyhold. And on the contrary, the counterpart of a lease in 1700 was proved, whereby the then lord of the manor demised *all the coal mines and veins of coal* under *all the lands* in the township of *Whitley* (one of the townships of the same manor) at a rent for 21 years. And also counterparts of other leases of the same sort, in different townships, one of them as old as 1684; and from thence down to a recent period; sometimes leasing coals and sometimes lime quarries, and extending in general terms to all other mines under the surface. This is the general result of the evidence given for the defendant; and it not only proves that by the original grant from the Crown, and of those through whom the Duke claims, that these estates were holden *at the will of the lord*, according to *the custom of husbandry of the manor*, or according to the *custom of the manor*; but it appears also from the ministers' accounts from *Mich.* 30 to *Mich.* 31 *Hen.* 8. (which are near 40 years older than the oldest date on the other side; the first admission produced on the part of the plaintiff, in which the words *at the will of the lord* are omitted, being the 17th of *Eliz.*) that the tenements were holden *at the will of the lord* at that period; only it omits the description "*according to the custom of husbandry;*" describing the rents however under the head of *husbandry rents.*

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On the part of Mr. *Grey* it was contended, that these estates are not *copyhold at the will of the lord*, but that they are *freehold* or of the nature of freehold, though passing *by surrender* and *copy of court-roll.* And the case of *Gale* v. *Noble* has been relied on in support of that argument. That case is only reported in *Carthew* (432), and there the lands were said not to be copyhold,

hold, because it did not appear in any of the rolls or copies produced that they were granted ad voluntatem domini, but only *secundum consuetudinem manerii.* Without impugning the authority of that case, and which it is not at all necessary to do for the decision at present, if it had appeared here that there was no evidence of any admissions to hold *at the will of the lord,* that case might have applied; though I am rather disposed to think that the general form of admissions, *according to the custom of the manor,* may be explained and qualified by the usage in such a manner as to shew that the freehold is in the lord: and what the usage was in that case does not appear by the report. But at any rate this case does not range itself under that of *Gale* v. *Noble;* for here the admissions are, during a long [429] period, uniformly to hold *at the will of the lord. Coke's Copyholder, s.* 41. was also referred to, in order to shew that the surrender is the important act, from whence the nature of the tenure is to be collected, and that the admittance must follow it, or it is void. But the terms of the surrender only point out to whom and for what estate the land is meant to be transferred by the tenant making such surrender, but cannot alter or vary the terms of the tenure itself; and therefore, says Lord *Coke,* if there be any variance between the admittance and the surrender, either in the person, in the estate, or in the tenure, or in any other collateral points, the lord doth only transfer an estate according to the surrender and his authority, *if it can take such effect.* And he instances, if a surrender be made to *J. S.* the lord cannot admit *J. N.;* but such admittance is wholly void. If there be a surrender to *J. S.* for life, and the lord admit him in fee, only an estate for life passes. So if a surrender be to one upon condition, and the lord admit absolutely, it is void: or if the surrender be absolute, and the admittance conditional, the condition is void. On the other hand it appears that a surrender cannot vary the custom of the manor any more than an admittance; but both the lord and the tenant are equally bound by the custom. Then in order to prove what is the custom of this manor in this respect, the plaintiff gave in evidence a copy of an Exchequer decree in the 19th of *Eliz.* in a cause of *Milbank and Others* v. *Dallaval and Others;* wherein the plaintiffs state themselves and their ancestors to have been immemorially seised of tenements in *Backworth,* and

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six other townships in the manor, holden *by copy of court-roll according to the custom of the manor, paying rent*, and * doing *border service*, and *defending Tynemouth castle from invasion*. This is the only part which affects this question, as a statement of their tenure; for the rest of the decree merely concerns a dispute as to the render of a corn-rent by *Winchester* or *Newcastle* measure. Then follows another decree in the 8 *Jac.* 1. which recites that the king's customary and copyhold tenants in *Backworth* and other townships of the manor had petitioned the king, *affirming* that they were *copyholders of inheritance;* and that there were immemorial customs within the manor for payment of *fines for admittances* to the said *copyhold* tenements, holden by copy of court-rolls *secundum consuetudinem* HUSBANDRIÆ of the said manor, upon descent, surrender, and alienation; that their *fines* were *certain;* and praying relief for wrongs done, &c. It is apparent from the whole of the decree (which his lordship read, referring particularly to those parts in italics) that the whole dispute was, whether the tenants held *estates of inheritance*, and upon *fines certain;* but it is no where suggested throughout all the proceedings that they had a *freehold* tenure. The decree affirms them to be *copyholders of inheritance* with *fines certain*. And where the word *freehold* (estates of *freehold* or inheritance) occurs once (and but once) in that decree, as applied to the estate of the tenants, it is plain from the whole context that it is used in speaking of freehold interests, in contradistinction to chattel estates, for terms of years: and there is no incongruity in such use of the word; for a person may well have a *freehold interest* in a *copyhold* tenement. That decree speaks of a reference from the king to the lord high treasurer, chancellor, and barons of the Exchequer, on which they decreed, &c. which refers to

[431] a stat. of the 7 *Jac.* 1. *c.* 21. (*a*) under the authority of which the

(*a*) 7 *Jac.* 1. *c.* 21. [illegible] for confirmation of decrees hereafter to be made in the Exchequer Chamber and Duchy Court, concerning customary or copyhold lands. Recited that there had been much question [illegible] lands held by copy of Court-roll, because [illegible] from time whereof, &c. [illegible] customary lands; or because fines [illegible] uncertain upon, &c. and their uses, customs, liberties,

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the reference was made, and which statute seems to have gone to the extreme limit of the powers of the legislature itself, and almost beyond them; for it confirms and establishes as copyholds all lands, &c. decreed to be such in the Court of Exchequer chamber or Duchy, during *three years next after the first day of that session of parliament*, according to the customs of the said manors severally and respectively, "according to the "purport and effect of such decrees, by such fines, rents, and "duties, and by, with, and *according to such customs*, privileges, "liberties, profits, and commodities, and in such manner and "form *as in and by the said decrees should be limited and ap-* "*pointed*." This statute is to be found in *Rastall*'s edition of [432]

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liberties, and privileges, are either uncertain, or not so plain but both for the present and in future times much trouble, loss, and disquiet may arise, &c. and may be a discouragement to the tenants in their endeavours in improving and husbanding their said lands; and that his majesty minding, &c. to settle and secure their copyhold estates according to the true meaning, &c. had been pleased that the Lord Treasurer and the Chancellor of the Courts of Exchequer and Duchy should take order upon reasonable compositions, &c. to establish their said copyhold estates by decrees of their said several Courts respectively, according to the true meaning, &c.: in performance of which his majesty's directions divers decrees had been made, and others are intended to be made: it enacts that all the messuages, cottages, lands, tenements, and hereditaments, contained or mentioned in any decree or decrees to be made in any of the said Courts of Exchequer Chamber or Duchy, at any time since the first day of this session of parliament, or within three years from hence next ensuing, upon compositions made, &c. with his highness's officers on his behalf as aforesaid, and in and by the same (*i. e.* Courts) decreed to be from thenceforth good and perfect copyhold lands, *shall, from the time of such decree or decrees made, be taken and adjudged to be good and perfect copyhold lands, tenements, and hereditaments, according to the true intent and meaning of such decrees respectively.* And that all persons may have and enjoy the said lands, &c. to them, their heirs and assigns, for ever, by *copy of Court Roll* or otherwise, according to the purport and effect of the said decrees, by such *fines, rents, duties*, and by and with and according to such *customs, services, liberties*, profits, and commodities, and in such manner and form as in and by the said decrees shall be limited and appointed. And to provide, that the said decrees shall be as binding as if specially inserted in this act, &c.

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the *Statutes*, but is omitted in the common editions of the *Statutes*. The next piece of evidence is an order of the Court of Exchequer in *Easter*, 12 *Jac.* 1. which reciting part of the former decree relating to the forms of the copies, and that the Earl of *Northumberland* had certified the accustomed form of a copy for such tenants as were admitted after death, directs such form to stand for a precedent in future: and in that form the habendum is to the tenant and his heirs *secundum consuetudinem husbandriæ manerii*, omitting *ad voluntatem domini*. At any rate it may be observed of this order or decree, that it was made out of time, and of course not within the authority of the statute, being made beyond the three years limited by the statute for that purpose. Upon this, however, it is contended, that (assuming the decree to be effectual,) inasmuch as it shews that the tenants held their estates *according to the custom of husbandry of the manor* only, without stating *at the will of the lord*, it follows from the doctrine laid down in the case of *Gale* v. *Noble*, that they had a *freehold tenure*. That argument, however, assumes that a holding *according to the custom of husbandry of the manor* must be taken to imply negatively, that it is *not according to the will of the lord*. But where reference is made to
[433] the custom generally, what that custom is in all its parts is to be collected from evidence of usage, *i. e.* from what has in fact been the custom acted upon. The words "according to the *custom of husbandry* of the manor" may have different interpretations. They may, though not properly for the present purpose, refer to a known course of husbandry in the manor regulating the culture of the tenants' estates: or they may mean that the tenants hold as husbandmen of the lord, in like manner as the villeins of the lord formerly were employed in the culture of the lord's lands, and as distinguished from an holding by military services properly so called, &c. &c. That the tenants held *according to the custom of husbandry of the manor*, whatever that custom was, is also proved by various copies of admissions beginning in the 17 *Eliz.* (prior in point of time to those produced by the defendant, in which "*at the will of the lord*" occur,) though some others state it generally *according to the custom of the manor*. These are followed up by a petition to *Algernon* Earl of *Northumberland*, complaining of the tenants' copies and customs having been altered, and their fines increased, on pretence of

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of their having divided without licence; all which are referred; but as nothing came of the reference, it is immaterial to dwell upon it. Likewise an inquisition in the 2 *Jac.* 2. for ascertaining what were the customs of the manor, and the duties, rents, and services, payable to the lord by the tenants for their *copyhold farms;* in which it is found by the jury charged with the inquiry, *that all the copyhold estates within the manor were copyhold estates of inheritance, according to the custom of the manor.* That *the widow* of a copyholder dying seised shall enjoy the *copyhold estate during widowhood*, without any fine for admittance. That the eldest son of a copyholder, succeeding by descent, shall pay 40*s.* fine on admittance for a whole farm; and so in [434] proportion for a half or quarter farm. But an eldest daughter taking in default of sons shall pay 4*l.* for a whole farm, and take only for life. This increase of fine on admittance of the daughter, who takes only a life estate, seems to have arisen from her inability to perform the border service. There is also *a custom* stated for the tenants to *lease* their copyhold lands by indenture for three years, *without licence;* but if leased for 20 or 21 years, then they must have a *licence*, and pay the steward's fee. There are also several other findings: but it is to be observed, that none of them state or suggest any right or claim on the part of the tenants to the freehold of their tenements. It was however proved, that upon examination of the book of surrenders, the surrenders all appear to have been to the use of the surrenderees, either *according to the custom of the manor*, or *according to the custom of husbandry of the manor*, and that there is no instance of a surrender to hold *at the will of the lord.* And this latter circumstance, upon the effect of which I have in part observed already, is the only evidence which avails the argument of the plaintiff, founded on the case of *Gale* v. *Noble*, that where the tenant holds *according to the custom of the manor* generally, without stating *at the will of the lord*, an intendment is to be made that the *freehold* is in the tenant. What the evidence of the custom in fact was in that case does not appear from the report, but merely, that in none of the rolls or copies was the holding stated to be *at the will of the lord.* Neither does it appear here by the evidence what the *custom of husbandry* is in this case. But in none of the various proceedings given in evidence in this case does it appear that there ever was any claim

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claim made by the tenants to the freehold of their tenements; the only claim insisted upon by them is, that they were *copyholders of inheritance* at *fines certain*, &c. But as to the freehold, the evidence of usage, which is of the utmost weight in cases of this sort, is, as far as it goes, wholly on the side of the lord. For there is no evidence that the tenants have ever gotten coal under their own lands, but the evidence uniformly is, that the whole of the coal gotten has been gotten in right of the lord by his lessees, &c. It is too much, therefore, to say, that there ought to be a new trial as in case of a verdict against evidence, or indeed that the evidence does not in this case greatly preponderate in favour of the verdict: though if it only stood in equal scales, there would be no occasion to disturb this verdict, which appears to have been given to the satisfaction of the learned Judge who tried the cause.

Rule discharged.

Saturday, June 7th.

STAREY *against* BARNS.

The drawer of a bill of exchange, which had been accepted, and was not refused payment by the acceptor till after the bankruptcy of the drawer, is discharged by his certificate; inasmuch as such debt is made proveable under his commission by the statute 7 *G.* 1. *c.* 31.

IN an action by the indorsee of a bill of exchange against the drawer, the Plaintiff declared that the Defendant on the 15th of *September* 1801, according to the usage and custom of merchants, drew a bill of exchange of that date on *J. Gardner* of *London*, requiring him two months after date, to pay to his the defendant's, order 100*l.* value received; which bill *J. Gardner* on the same day and year accepted: that the defendant before the time appointed for the payment thereof indorsed it to *J. Warwick*, or order, who before it was due indorsed it to the plaintiff: and that afterwards when it became due, on the 18th of *November*, 1801, it was presented to *J. Gardner* for payment, * who on request refused to pay the same, and made default: of all which premises the defendant afterwards, on the 21st of *November* 1801 at *London*, had notice, &c. by reason whereof, &c. The second count charged, that the like bill drawn by the defendant on *J. Gardner*, and made payable to the defendant, or his order, was accepted by *Gardner*, and afterwards,

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terwards, and before it became due, was indorsed by the defendant to the order of the plaintiff, and by the plaintiff to *Moses Gardner*; and that afterwards when the bill became due, on the 18th of *November* 1801, it was presented for payment to *J. Gardner*, who refused payment and made default: and thereupon the bill was returned to the plaintiff, who was afterwards, on the 25th of *March* 1802, obliged to pay the same: of all which premises the defendant on the said 25th of *March* had notice, &c. There were also the common money counts. The only plea was, that the defendant, before the exhibiting of the plaintiff's bill, viz. on the 6th of *November* 1801, became a bankrupt, and that the several causes of action in the declaration mentioned accrued to the plaintiff before the defendant's bankruptcy; on which issue was joined. At the trial before Lord *Ellenborough* C. J. at the sittings after last *Michaelmas* term at *Guildhall*, the facts stated in the declaration standing admitted, it was proved in support of the defendant's plea (upon which alone the question arose) that a commission of bankrupt issued against the defendant and *J. Gardner* on the 6th of *November* 1801, and that their certificate was allowed on the 24th of *March* 1802; and it was thereupon contended, that the debt was barred. But a distinction being taken between this case, where the bill having been accepted, the drawer only became contingently liable in default of the acceptor, which default was not made till after the bankruptcy, [437] and consequently no debt due from the drawer before; and prior cases which had been decided, where, the bill being refused acceptance, the drawer became immediately liable; Lord *Ellenborough* directed a verdict to be found for the plaintiff for 120*l.*, the amount of the bill and interest, with liberty to the defendant to move to set it aside, and enter a nonsuit, if the Court should be of opinion that the debt was barred by the defendant's certificate. A rule nisi was accordingly obtained for this purpose in *Hilary* term last, which was grounded principally upon the authority of *Macarty* v. *Barrow*, (*a*) where it is said

(*a*) 2 *Str.* 949. and 2. *Wils.* 16. and 2 *Bernard.* 251, 5.

The following note of this case is from Mr. *Ford's* MS. *vid. ante*, 247.

Macarty against *Barrow*, *E. 6. G. 2. B. R.* The defendant, in the month of *December* and till the 6th of *January* 1728, drew bills of exchange

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said that the drawing of a bill creates a debt, and other cases were referred to, as *Cowley* v. *Dunlop*, (*a*) *Rolfe* v. *Caslon*, (*b*) *Francis* v. *Rucker*, (*c*) and *Ex parte Adney*. (*d*)

Park and *Wigley* now shewed cause against the rule; and relied upon the distinction, arising out of the cases decided, between bills accepted and not accepted at the time of the drawer's bankruptcy. There is an implied engagement by the

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exchange upon Messrs. *Parmenter* and other merchants at *Bilboa*, payable at a future day; and upon the 13th of *January*, in the same year, a commission of bankrupt issued out against him, on which he was found a bankrupt: and in *February* and *March* following the bills were returned to *England*, protested for non-acceptance; upon which the defendant was arrested, and sued to execution: and having now obtained his certificate, *Foulkes* moved that he might be discharged in pursuance of the act 5 *G.* 2. *c.* 30. whereby the benefit of the act 5 *Geo.* 1. *c.* 24. is conveyed to bankrupts obtaining a certificate, (viz.) to be discharged by the Court that issues the process from all actions founded upon any debt contracted before an act of bankruptcy committed. And although *Strange* for the plaintiff urged, that it did not appear when the defendant first became a bankrupt, and that he was not chargeable upon the said bills of exchange before they had been refused acceptance by the drawee, and had been protested, or at least before the day of payment, which was not till after the going out of the commission of bankrupt; yet *the Court* resolved that he should be taken to be a bankrupt the day the commission was executed, and that they could not intend he was a bankrupt sooner; but if the plaintiff would suppose he was, the fact ought to be shewn by him. And as to the objection, that the defendant had not contracted any debt before the protest; they resolved that a debt was created immediately upon drawing the bills, before the day of payment, or any protest made; the money to be received upon the bills being debitum in præsenti, though solvendum in futuro; and that the protest did not raise any debt, but was only notice to the drawer of the drawee's refusal to pay the bill.

LEE Justice said, that the 7 *Geo.* 1. *c.* 31. which enables persons who have securities for money payable at a future day to come under the commission, extends to all sorts of securities given upon a good consideration, though the money did not become due for goods sold to the defendant, as was urged by *Strange* that it ought.

(*a*) 7 *Term Rep.* 565. (*b*) 2 *H. Blac.* 570.
(*c*) *Amb.* 672. (*d*) *Coop.* 460.

drawer

drawer of a bill to the person in whose favour it is drawn, that the drawee will accept it; and if it be dishonoured it may be considered as referring the holder to his original present debt against the drawer, which is evidenced by the bill; the implied consideration having failed on which he agreed to receive a bill payable at a future time. (*a*) But it is otherwise where the bill is accepted; for then the original debt is merged, and the only remedy of the holder, even against the drawer, is upon the bill, by which a new contract between them is created, and no present debt exists, but only a *future contingent* liability, in case the acceptor shall make default on the stipulated day of payment. Then the bankruptcy of the drawer having happened before that day arrived, the bill could not be proved under his commission; for there was then no *debitum in presenti* solvendum in futuro; but it was altogether contingent whether the bankrupt [439] would ever be indebted at all or not. And the stat. 7 *Geo.* 1. *c.* 31., which enables persons holding securities for money payable at a future day certain to come in under the commission, extends only to debts which are certainly due from the bankrupt at such future day. The case of *Macarty* v. *Barrow* was where bills drawn upon *Spain* by the defendant before his bankruptcy were returned protested *for non-acceptance;* therefore the then present debt which was raised by his drawing before the bankruptcy never became contingent. For it has been decided, that the drawer is liable immediately on the non-acceptance of the drawee, though the time for which the bill was drawn be not elapsed. *Rolfe* v. *Caslon*, (*b*) and *Cowley* v. *Dunlop*, (*c*) were both cases of counter-acceptances. In the latter, the Court were divided in opinion on the question whether such exchange of paper created a present existing debt which might be proved under the commission.

Sir *V. Gibbs*, (and *Marryatt* was with him) in support of the rule, contended that immediately upon the drawing of a bill a debt is raised from the drawer, which continues till satisfaction

(*a*) Vide *Milford* v. *Mayer*, *Dougl.* 54. and *Ballinghall* v. *Gloster*, 3 *East*, 481.

(*b*) 2 *H. Blac.* 570.

(*c*) 7 *Term Rep.* 565. and vide *Buckler* v. *Buttivant*, 3 *East*, 72. *Houle* v. *Baxter*, ib. 177. and *ex parte Marshall*, 1 *Atk.* 129.

of

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of the bill, although it cannot be enforced against him until default made by the acceptor; and then the drawer is answerable with a retrospect as from the time of the bill drawn. And he relied upon the principle of the case of *Macarty* v. *Barrow*; which, though the case of a bill protested for non-acceptance, was decided upon the ground, as stated in the more correct report of it in *Wilson* from the note of Lord C. J. *Wilmot*, "that the drawer of a bill of exchange instantly upon his drawing the bill contracts a debt." Whether the bills in that case were refused acceptance before the bankruptcy of the drawer does not appear by the report; though the argument of *Strange*, who was counsel for the plaintiff, leaves room to infer that the non-acceptance was after the bankruptcy; which would assimilate the cases very nearly: for till the dishonour it could not be told whether the drawer would ever be liable to be sued upon the bill; and yet he was holden entitled to be discharged under his certificate. And it is clear from what was said by the Lord Chancellor in the case *Ex parte Harrison*, (*a*) that he considered that the holder of a bill might prove his debt under the commission of the indorser, though the bill did not become due till after the bankruptcy. He was then stopped by the Court.

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Lord ELLENBOROUGH C. J. Upon referring to the act of the 7 *Geo.* 1. *c.* 31. I think the plain letter of it is decisive of this question, without going upon any other more uncertain ground. With all the respect which I feel for the opinion delivered in *Macarty* v. *Barrow*, that the mere drawing of a bill upon another payable at a future time creates a present debt from the drawer, recognized as it was by Lord C. J. *Wilmot* in *Chilton* v. *Whiffin*, I should have doubted whether the giving a credit upon another person at a future time, whereby the drawer virtually agrees that if the drawee do not accept the bill, he will pay it, constituted any thing else than a contingent future liability in the drawer upon the default of the drawee. However, I feel myself relieved from any difficulty on the subject upon the plain ground that the defendant is entitled to his discharge under the statute. After reciting that traders were often obliged to dispose of their goods on credit, and to

(*a*) 2 *Pro. Ch. Cas.* 615.

take

take bills, &c. payable on future days, and that the buyers becoming bankrupts before the money upon such securities became payable, it had been a question, whether such persons giving such credit on such security should be let in to prove their debts before such securities became payable; for remedy it enacts that "Every person who shall give credit on such securities as aforesaid" (here credit was given by the party on such a security) "to any person who shall become a bankrupt," (this is the case here,) "upon good and valuable consideration for any sum of money, or other matter or thing whatsoever," (an exchange of securities is a good consideration according to *Cowley* v. *Dunlop* and other cases,) "which shall not be due or payable at or before the time of such person's becoming bankrupt," (that is the fact of this case,) "shall be admitted to prove their respective bills, &c. in like manner as if they were made payable presently, and not at a future day." In every respect therefore, the circumstances of this case tally with the description in the statute. Without, therefore, admitting the principle that the drawing of such a bill constitutes a *debitum in præsenti*, it is sufficient to say, that by the express words of the statute the debt was proveable under the defendant's commission, and therefore he is discharged by his certificate.

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GROSE J. declared his concurrence on the ground of the statute. But observed also, that he should hesitate long before he decided against the doctrine laid down in *Macarty* v. *Barrow*, which had often been recognized since; that the drawing of a bill of exchange constituted a *debitum in præsenti* from the drawer, though *solvendum in futuro*.

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Per Curiam, Rule absolute for entering a nonsuit.

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Monday, June 9th.

A devisee for life of an estate, part of which was a brick-ground, making bricks there for sale generally, with a view to profit, is not a trader within the bankrupt laws, though he purchased the coals and some of the wood used in burning the bricks; and had occupied the same ground as a brick-maker for general sale before the estate came to him by devise; for this is but a more beneficial mode of enjoying his own estate, by carrying the soil to market in an ameliorated state, and is not a buying of any commodity to sell it again; nor does it fall within the principle of the bankrupt laws, which were levelled against those who, getting other men's goods, into their hands, obtain credit upon and consume the same.

THIS was a feigned issue, directed by the Lord Chancellor on a petition in the matter of the Defendant's bankruptcy, to try the question whether the defendant had been a trader within the bankrupt laws at any time between the 26th of *September* 1796 and the 1st of *January* 1803, the Plaintiff in such issue asserting the affirmative. The cause was tried at the last assizes for *Essex*, before *Heath* J., when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

The defendant in the year 1795, his name being then *John Marsh*, and then residing at *Weeleigh* in *Essex*, opened, and entered with the excise officer of the district in which he resided, a public kiln, as a *brick-maker*, in his then name of *John Marsh*. When he so opened the kiln he had no interest in the estate from which the brick-earth * was dug, the same being the property of one *Samuel Weeley:* and the defendant there carried on the brick-making-business until the death of *Weeley* on the 17th of *September* 1796. Immediately after *S. Weeley*'s death the defendant entered into possession of the estate, on a part of which the said brick-kiln was erected, and from which the brick-earth had been procured, as devisee thereof, for the term of his own life, for his own use and benefit, under the will of *S. Weeley*, subject to the incumbrances; and the defendant continued in possession as tenant for life until the issuing of the commission of bankrupt against him on the 16th of *January* 1804. The annual value of the estate and manor was at *S. Weeley*'s death 750*l.* per annum, the greatest part of it then and still being under-let to tenants; and the whole is subject to incumbrances to the amount of 230*l.* per annum, and consists of about 900 acres. Immediately after *S. Weeley*'s death the defendant re-entered the same kiln at the excise-office in his then name of *John Weeley;* and his kiln was surveyed every 14 days by the surveying officer of the district from its first

entry

entry in 1795 until *July* 1799. It was a large and capital kiln, capable of burning 30,000 bricks at a time, and during all the above period was kept by the defendant *for the general sale of bricks and tiles to any purchaser;* and bricks and tiles were sold there to any person who came to buy them, and that in great quantities, *with a view to profit;* the defendant usually employing seven or eight workmen at his kiln, who made the bricks at a certain price per thousand. During the above period the defendant yearly made from 150 to 200,000 bricks, and a great number of tiles, part of which were during that period used by him in repairs on the said estate, and in building a cottage on the brick-ground for the foreman to live in, [444] and a piggery and other buildings on the said estate: but the greater proportion thereof were sold to customers in general: and during that period the defendant at various times solicited custom from several persons to purchase bricks and tiles from him at the said kiln, and he exchanged bricks and tiles with one person for coals. On the 30th of *January* 1796, the defendant inserted an advertisement in the *Ipswich* Journal addressed to tile-makers, for a tile-maker; and stated therein that a good hand might have constant employ in an extensive vein of capital earth. And in *July* following he inserted another advertisement, addressed to brick and tile-makers, for a person who was a complete master of the business of making chimney-pots, glazing tiles, &c. to undertake the management of a brick-kiln where there was an extensive vein of excellent brick and tile earth for red ware only. He thereupon procured one *Cook* as a foreman, to whom he represented at the time of engaging him that he should burn from 5 to 600,000 bricks a year for sale. *Cook* from the beginning of 1796 superintended the brick-making business until *July* 1799, when the defendant entirely gave up brick-making; from which time *Cook* and *G. Marsh* (the defendant's brother) hired the brick-kiln and premises of the defendant, and carried on the brick-making business therein, on their own account, for some time; after which the defendant let the premises to *J. Marjoram*, who still continues to carry on the brick-making business therein. The defendant, from the first opening of the brick-kiln in 1795, until the death of *S. Weeley*, and afterwards until he left off brick-making in *July* 1799, carried on without interruption the manu-

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manufacturing and selling of bricks and tiles at the said kiln, in the same manner, and with the same view to profit. The * coals and some of the wood used in burning the bricks were bought of two or three different persons; but some of the wood, and all the brick-earth, straw, and sand, used in the brick-making, were procured and raised as aforesaid by *John Weeley* from different parts of the estate, and not bought. And the brick-earth, straw, wood, and sand, procured and raised from the estate, so first belonging to *S. Weeley*, and afterwards to the defendant himself, for his life, subject as aforesaid, during the above period, and used in making the bricks and tiles from the time when the defendant first commenced the brick-making business until he declined it, upon an average formed less than a fifth part of the expence of the coals and wood purchased for the manufacturing such bricks and tiles, and the labour employed in rendering them saleable at the kiln, including the excise duty to be paid upon the same. The question for the opinion of the Court was, if the defendant were a trader between the days stated? If he were, then the verdict to stand: if not, then a nonsuit to be entered.

The case was argued in last *Hilary* term by *Pooley* for the plaintiff, and *Wetherell* for the defendant. The general point whether a person renting or otherwise acquiring brick ground, for the purpose of making bricks for general sale, be a trader within the bankrupt laws, having been several times before much discussed in the cases ex parte *Harrison* (*a*) in Chancery, and *Parker* v. *Wells*, *C. B.* (*b*) *B. R.* (*c*) and *Dom. Proc.* (*d*)

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where all the cases bearing upon this question are collected, it is unnecessary to detail the arguments, especially as the Court, in giving judgment, notice such of them as appeared to throw any new light upon the subject. The Court, at the time of the argument, intimated their opinion very strongly against the bringing a person circumstanced as the defendant within the scope of the bankrupt laws: but said, in answer to an intimation that gentlemen had taken notes for a second argument,

(*a*) 1 *Ves. & B.* 172, and *Cooke's Bankrupt Laws*, 5th edit.
(*b*) *Cowp.* 37, and *Cooke's Bankrupt Laws*, 97.
(*c*) 1 *Term Rep.* 95.
(*d*) *Bl. Com.* *Cooke* and *Mont.* 60, and 1 *Tidd's Pract.* 545.

that

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that the case had been so fully and ably discussed already, that nothing more could be said upon it: and that they would deliver their opinion after they had conferred together upon it. No opportunity occurred for doing this during *Easter* term, the greater part of which was occupied by the trial of Lord Viscount *Melville*, in the great Hall. And now the opinion of the Court was delivered by

Lord ELLENBOROUGH C. J. This case is, as was contended by the defendant's counsel in his argument, distinguishable from the case of ex parte *Harrison*, in which Lord *Thurlow* refused a new trial; where a brick-maker having taken earth from the waste, and having made a compensation on that account to the lord, was found by the jury to be a trader; and from that of *Wells* and *Parker*, in which the opinions of the King's Bench and Common Pleas differed, and on which, in the House of Lords, there was ultimately no decision; inasmuch as in both those cases the earth employed in making bricks was acquired for that very purpose: and it is not necessary to say what would be our opinion if a case similarly circumstanced to the one or the other should come before us. In the present case *Weeley*, by devise, took a freehold interest in the brick earth, and can in no way be considered as buying any [447] thing, which he sold again; but like a burner of his own chalk or rock into lime, the smelter from his own mines of iron or lead ore into pigs, or the manufacturer of his own rock into allum, appears to have merely carried his own soil to market in some way manufactured. What reason then is there that he should be holden a trader more than the several other venders of their own manufactured soil already mentioned. It can make no difference that in this case the manufactured soil was clay, in the others, rock of various sorts, or chalk. In order to smelt and flux iron and lead considerable quantities of fuel and some ingredients are necessary: so too in order to make rock allum into merchantable allum. And for making clay into bricks no greater variety of additional articles is required than is required for manufacturing and rendering the particular substances saleable in the foregoing instances. In the several cases of the lime-burner, the smelter of ore, and the maker of allum, although the surface of the earth might produce some profit, yet the selling the soil under such surface, or part of such

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such soil, in a state essentially altered by various processes of manufacture, has been holden not to alter the character of the land-owner, nor to convert him into a person who can be properly said to carry on *the trade of merchandize*. The principle of the bankrupt laws, as is to be found in the statute of *Hen.* 8. referred to in the argument by the defendant's counsel, is to prevent persons craftily obtaining into their hands great substance of other men's goods, and at their own wills and pleasures consuming the substance obtained by credit of other men: and the subsequent statutes relating to bankrupts
[448] were made for the better providing against the persons described by that statute, and for the more accurately defining who ought to be taken to be a bankrupt: in no one of which is there any term made use of which is not descriptive of persons to whom in the actual course of their business extensive credit is given, and that for the very purpose of carrying it on. And where particular employments are not specified, such as that of a scrivener, the general description cannot be satisfied without there be *both a buying and selling*: this is implied in the words *using the trade of merchandize*; for a merchant is so denominated from his being *a buyer to sell again*: but one who burns into bricks the clay of the land of which he is seised as devisee, and then sells the bricks so made, is no buyer of any thing to sell again: nor is he one the course of whose business requires that he should obtain great substance of other men's goods upon credit. And it is always to be remembered, that it is the protection of persons who have so given credit which is the professed object of the bankrupt laws.

Judgment of Nonsuit
to be entered.

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LUBBOCK and Another *against* POTTS.

Monday, June 9th.

THIS was an action on a policy of insurance upon the ship *Speedwell* and cargo, "at and from *Trinidad* to *Gibraltar*," with liberty to touch, stay, and trade, load, unload, and reload, shift, and exchange property at all or any of the *West-India* islands, particularly *Martinique;* the insurance to continue upon the ship until she should arrive at *Gibraltar* and have moored at anchor 24 hours in good safety; and upon the goods from the loading thereof until the same should arrive at *Gibraltar*, and be there discharged: at a premium of 20 guineas per cent., to return 10*l.* per cent. if the ship should have convoy for the voyage and arrive. The declaration, after setting forth the policy as above, dated 2d of *June* 1801, stated that afterwards, on 3d of *June* 1801, the Defendant, in consideration of a further premium of 5 guineas per cent., agreed that the said insurance should be "against all risks whatsoever, *British capture, seizure, and detention included.*" It then stated, that on the 1st of *May* 1801, the ship was in safety at *Trinidad*, and on the same day departed from thence on the voyage insured for *Martinique*, where she arrived on the 20th of *May;* that on the 2d of *June* a large quantity of goods was there put on board to be carried from *Martinique* to *Gibraltar;* and that the ship with the goods afterwards sailed from *Martinique* upon the voyage insured, but that before her arrival at *Gibraltar* she was lost by the perils of the seas.

At the trial before Lord *Ellenborough* C. J. at the sittings after last *Trinity* term, the policy with the subsequent memorandum was proved: and it also appeared that the ship which went out from *Gibraltar* arrived at *Trinidad*,* and afterwards sailed from thence to *Martinique* with some goods on board, but took in sugar and coffee, being the principal part of her cargo, at *Martinique:* both *Trinidad* and *Martinique* being at that time in the possession of the *British* by capture: and that immediately upon her arrival in the outer road of *Gibraltar* a sudden and violent squall of wind arose, in consequence of which she was driven upon the rocks and bulged. The Plaintiff recovered a verdict; but two objections were reserved,

Colonial produce cannot legally be shipped from the *British West Indies* for *Gibraltar*, and therefore the same cannot be insured on such a voyage: and it matters not that part of the cargo was shipped at one of the *West India* islands, with liberty to exchange it at another, (which would have been legal) if in fact it were not exchanged, and its ultimate destination was *Gibraltar*. And the ship and cargo being lost off *Gibraltar*, though the assured could not recover, yet the premium having been paid upon an illegal insurance cannot be recovered back.

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upon which a rule nisi was obtained in *Michaelmas* term last for setting aside the verdict and entering a nonsuit, 1st, That the memorandum extending the insurance against *British capture, seizure, and detention,* vitiated the policy. 2d, That the trade insured, being colonial produce from the *British* colonies in the *West Indies* to *Gibraltar,* was illegal by the navigation laws.

Sir *V. Gibbs* and *Carr* now shewed cause; and upon the first point argued that the memorandum, however illegal, being made at a time subsequent to the making of the policy, would not affect it, but at most would only be void, and the case would stand as if no such memorandum had been made. But they also contended that the memorandum was legal; for that *British* property might through ignorance or wrong be seized, captured, and detained, as well by *British* privateers as by the king's ships of war, and loss and damage would thereupon ensue though the property were afterwards liberated; against which loss the assured might lawfully contract to be indemnified: and that if the words were capable of a construction which would make the insurance lawful, the Court would not intend them in any other sense. *The Court* seeming to coincide with the plaintiff's counsel on this point;

[451] *Park* contrà (with whom was *Marryat*) contended upon the authority of what was said in *Kellner* v. *Le Mesurier*, (*a*) that an insurance against *British* capture, *eo nomine*, was illegal and void; and that the memorandum was incorporated with the policy by the terms of it, and made all one contract, which could not be severed. That *British detainer* includes an embargo by the king's authority, against which, though happening without any fault imputable to the owner of the goods, it would be unlawful to insure *eo nomine;* because of the policy of creating an interest in any subject against the acts of our own government.

The Court observed, that what was said in *Kellner* v. *Le Mesurier* must be taken with reference to the subject matter; that being the case of a policy on a foreign ship, the general words of which were considered as not extending to insure the party against *British* capture in case of hostilities: (*b*) and they still

(*a*) 4 *East*, 402. (*b*) See also *Gamba* v. *Le Mesurier*, ib. 407.

seemed

seemed inclined to think, that construing the words of the memorandum in a favourable sense, as extending only to cover losses happening from unlawful capture, seizure and detention by *British* ships; or even extending it to temporary lawful detention, without any fault of the assured; the memorandum would not vitiate the policy. However, without deciding this point, they called upon the plaintiff's counsel to answer the other objection.

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Sir *V. Gibbs* and *Carr* contended, 2dly, that the voyage insured was legal. The island of *Trinidad* to which the ship first went, and *Martinique* where she afterwards shipped the colonial produce in question, were both at that time *West India* colonies under the *British* government; and there is nothing in any of the navigation laws which prohibits *British* colonial produce from being carried to any other *English plantation*, such as *Gibraltar* must be considered to be, though situated in *Europe*. The stat, 12 *Car.* 2. *c.* 18. *s.* 1. enacts, that no goods shall be imported into or exported from any lands, islands, plantations, or territories belonging or which may hereafter belong to or in the possession of the king, his heirs and successors, but in ships belonging to the people of *England*, or *Ireland*, *Wales*, or *Berwick-upon-Tweed*. Then by *s.* 18. "No sugars, &c. of the growth, &c. of any *English plantations* in *America*, *Asia*, or *Africa*, shall be transported from any of the said *English* plantations to any land, island, territory, dominion, port, or place whatsoever, *other than to such other* English *plantations* as belong to his majesty, &c. or to *England*, or *Ireland*, *Wales*, or *Berwick-upon-Tweed*" on pain of forfeiture, &c. Then by *s.* 19. ships sailing from *England*, *Ireland*, *Wales*, or *Berwick upon-Tweed:* shall give bond, that in case they shall load any of the said commodities at any of the said *English* plantations, they shall be landed at some port of *England*, *Ireland*, *Wales*, or *Berwick-upon-Tweed:* and for all ships coming from any other port or place to any of the aforesaid plantations, which by this act are permitted to trade there, bond shall be taken that such goods shall be carried *to some other of his majesty's English plantations*, or to *England*, *Ireland*, *Wales*, or *Berwick-upon-Tweed*. This, they observed, was the principal act which directly regulated the intercourse between the mother country and its colonies, and between those several colonies; and the express object being to promote

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the shipping and navigation of *England*, that object was as well attained by promoting a free collateral intercourse between the several colonies, &c. in *English* ships, as by the direct intercourse between the respective colonies and the mother country. By *s.* 9. indeed of stat. 15 *Car.* 2. *c.* 7. a penalty is inflicted on custom-house officers in *England*, or *Wales*, or *Berwick*, giving warrant to suffer any sugar, &c. the growth of the said colonies, &c. to be carried to any other country, until first unladen and put on shore in some port of *England*, *Wales*, or *Berwick-upon-Tweed*. But this must be construed with reference to the former provision, and must apply to *other countries* than an *English plantation*. The same act, *s.* 6. provides that no *European* commodity shall be *imported* into any plantation, &c. of his majesty, &c. in *Asia*, *Africa*, or *America*, but what shall be shipped in *England*, *Wales*, or *Berwick-upon-Tweed*, in *English* ships. But it is no where directly provided that colonial produce may not be brought to any *English* colony, plantation, &c. in *Europe*, so as to exclude *Gibraltar*. Then the subsequent act of the 22 & 23 *Car.* 2. *c.* 26. *s.* 10 & 11. reciting the last-mentioned statute, and particularly the 6th section, and reciting further the prejudice to *England* by ships going with plantation produce to *Ireland*, (which it must be observed was, like *Scotland* before the Union, an independent kingdom, and having different revenue laws, though under the same sovereign) by means of bonds taken for the return of such ships to *Ireland*, as well as *England*, *Wales*, and *Berwick*, under the general words of the stat. 12 *Car.* 2. *c.* 18. *s.* 19. it therefore directs that *Ireland* shall be left out of all such bonds taken from any ship *sailing from England*, *Ireland*, *Wales*, or *Berwick-upon-Tweed* for any *English* plantation in *America*: and directs as before, "that in case the
[454] *said* ship shall load any of the said commodities at any of the said *English* plantations, they shall be brought to some port of *England* or *Wales*, or to *Berwick-upon-Tweed*, and shall there *unload and put on shore the same*. And in like manner for all ships coming from any other port or place to any of the aforesaid plantations, which by the said act are permitted to trade there, &c. bond shall be taken that such ship shall carry the said goods "*to some other of his majesty's English plantations*, OR to *England*, *Wales*, or *Berwick-upon-Tweed*," &c.: and then it gives a forfeiture for disobedience. It does not say, "to some other of

of his majesty's *English* plantations" *in America, Asia, or Africa.* A *plantation* is not confined to settlements for raising produce, but in a general sense, as here used, means any place where a colony of men has been planted. And at any rate the illegality of the transaction is made to depend upon the *unlading and putting on shore* colonial produce in a prohibited place, which was not the case here.

Lord ELLENBOROUGH C. J. It is quite plain from the whole scope of the navigation laws in the time of *Car.* 2. that colonial produce could not legally be shipped from the plantations in the *West Indies* to any part of *Europe* except *England, Wales,* and *Berwick-upon-Tweed;* though since the Unions the privilege has been extended by particular acts. (*a*) A strong legislative declaration of this is to be found in the stat. 25 *Car.* 2. *c.* 7. *s.* 2. which recites the prior permission to carry produce, the growth of the plantations in *America, Asia,* or *Africa,* from the places of their growth to any other of his majesty's *plantations in those parts* (*Tangier* excepted,) without paying duties; [455] and that the inhabitants of divers of those colonies, *contrary to the express letter* of those laws, *have brought into divers parts of Europe* great quantities thereof, which they vend to foreign shipping, &c. to the hurt and diminution of the customs and trade and navigation of this kingdom: and for remedy imposes certain duties on all such commodities, unless bond be given to bring the same *to England, or Wales, or Berwick-upon-Tweed,* and *to no other place,* and there to land and put the same on shore. (*b*) The term *plantation* in its common known signification is applicable only to colonies abroad where things are grown, or which were settled for the purpose principally of raising produce; and have never in fact been applied to a place like *Gibraltar,* which is a mere fortress and garrison, incapable

(*a*) *Vide* Act of Union with *Scotland,* 5 *Ann. c.* 8. article 4. and 12 *G.* 2. *c.* 30. and 15 *G.* 2. *c.* 33. and the Act of Union with *Ireland* 39 & 40 *G.* 3. *c.* 67. article 6.

(*b*) *Vide* stat. 7 & 8 *W.* 3. *c.* 22. *s.* 8. *Vide* also the stat. 22 & 23 *Car.* 2. which recites the same mischief, and enacts "that if any ship belonging to "any of his majesty's plantations, which shall have on board any sugars, &c. "shall be found to have unladen *in any port or place of* Europe *other than* "England, Wales, *or* Berwick-upon-Tweed, such ship shall be forfeited," &c.

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of raising produce, but supplied with it from other places. In truth the term *plantation*, in the sense used by the navigation laws, has never been applied either in common understanding or in any acts of parliament (at least none such could be pointed out when demanded in the course of the argument) to any of the *British* dominions in *Europe;* not to *Dunkirk* while that was in our possession, nor at the present day to *Jersey*, *Guernsey*, or any of the islands in the channel. And the continued exclusion of all these from the direct import trade of the colonies, affords a strong practical exposition of the law. And as to the illegality of the transaction attaching only upon the landing of the goods; he said, that though the forfeiture might only attach upon the landing of the goods, yet that the shipping them for that purpose was illegal, and avoided the insurance on such a voyage. The other Judges concurred in the same opinion.

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It was then suggested by the plaintiff's counsel, that as the whole voyage was illegal, (which did not appear to have been known to the assured at the time, nor the insurance entered into with intent to contravene the law,) the risk had never attached, and therefore the premium ought to be returned. And in answer to an objection started, that as some part of the cargo was shipped at *Trinidad*, and a liberty was given to exchange, load, and unload at *Martinique*, the voyage would be legal between the two islands, and therefore the risk had commenced; they observed, that there was no evidence of any exchange of cargo at *Martinique:* and that if the shipping the goods at *Trinidad* for *Gibraltar* were illegal, it would not make it less so that liberty of exchange at *Martinique* was given, which liberty was not exercised.

Park contrà referred to *Andrée* v. *Fletcher*, (*a*) *Vandyck* v. *Hewitt*, (*b*) and *Morck* v. *Abell*, (*c*), to shew that the assured cannot recover back the premium paid upon an illegal insurance, though unknown to him in fact to be such at the time.

Lord ELLENBOROUGH C. J. said, that to be sure every person must be taken to be cognizant of the law. And the Court

(*a*) 3 *Term Rep.* 266.
(*b*) 3 *Bos. & Pull.* 35.
(*c*) 1 *East*, 96.

agreed

agreed that the plaintiff was not entitled to a return of premium in this case.

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Rule absolute. (*a*)

(*a*) Quære, Whether the premium had not been paid into court in this case; but this was not stated in court.

FREELAND and Another, Assignees of TIPPING, a Bankrupt, *against* GLOVER.

Monday, June 9th.

THIS was an action on a policy of insurance on goods on board the ship *Neptune*, "lost or not lost, at and from 24 hours after her arrival at her first place of trade on the coast of *Africa*, during her stay and trade on the coast of *Africa* and *African* islands, and at and from thence to *Liverpool*;" at a premium of 25 guineas per cent. The declaration contained the usual averment that the ship, with the cargo, was, after

A ship on an *African* voyage, the common duration of which several months, and sometimes extends to a twelvemonth or more, arrived on the coast in *August* 1799, and in *February* 1800 her then commander wrote a letter to his owners, mentioning an attack on her at another place on the coast by the natives, who killed the captain and several of the crew, and wounded others; by means of which and a fever the crew were reduced to five, and all those sickly, and not a man to be procured at hand: that they had been plundered of their clothes, &c. and their cabin stores were exhausted, and they did not know what to do. A second letter, dated 21st *April*, 1800, from *Gaboon River*, mentioned their arrival there on the 24th *March; that the natives finding them weakly handed, and their goods taken from them, did as they pleased*: that they had *then* 9 men on board, *but* their *provisions* run very low: that he had mentioned certain parts of the cargo in *his last letter*, and expected to ship the rest and to sail at the end of the *next month*. An insurance was effected in *September* 1800, *on the production of the last letter only*, "*at* and from the ship's arrival at her first place of trade on the coast of *Africa*," &c. Held sufficient that the last letter truly stated the *then* condition and circumstances of the ship; which, though better than when the first letter was written, was yet *no fraudulent concealment* of the *former* circumstances; the second letter, both in its terms and contents, referring to a former letter, which it was the fault of the underwriters not to have called for, if they thought that a particular knowledge of former difficulties in part subdued, and to the extent truly stated in the second letter, would have varied the risk; and when the underwriters, cognizant as they must be presumed to be of the common duration of such a voyage, could not fairly collect from the contents of the second letter that the first arrival of the ship *on the coast* was only on the 24th of *March*, when she was stated to have arrived *in Gaboon River*, and to have had much of her homeward-bound cargo on board on the 21st of *April*, and was expected to sail with the remainder by the end of *May*.

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24 hours from her arrival at her first place of trade on the coast of *Africa*, to wit, on the 16th of *June* 1800, in good safety at a place * authorised for the said ship to be at within the risk and meaning of the policy. It then stated a loss by the perils of the sea in the course of the voyage insured homewards. The cause was tried at the sittings after *Hilary* term last at *Guildhall* before Lord *Ellenborough* C. J. when a verdict was found for the Plaintiffs: and a rule nisi having been obtained for setting aside the verdict and having a new trial, the only question was, whether at the time of the insurance effected material information had been concealed from the underwriters? As to which it appeared that the *Neptune* sailed from *Liverpool* on a general trading voyage to the coast of *Africa* in *June* 1799, and arrived at *Gaboon* on that coast on the 7th of *August* following. And on the 15th of *February* 1800, *Skelton*, the then master wrote the following letter, dated *Bimbia*, to *Tipping* one of his owners; the suppression of which, as well as of information of the time when the ship first arrived on the coast, from the knowledge of the underwriters, was the subject of complaint. " Sir, I am sorry to inform you of the melancholy circumstance that happened on board the snow *Neptune* off *Cape St. John's*, close to the river *Danger*. Capt. *Fisher*, finding all the ship's crew in a very bad fever, thought it proper to stand in shore and get some stock for the sick. Three canoes came off, and we bought fowls, &c.; but the blacks began to be very impudent. The blacks took a cutlass from the captain, and killed him on the spot, and stabbed him in twenty places. They killed the steward and one of the landsmen: the rest of the people all very much wounded. There were a good many of the blacks killed on the deck by the boatswain and two of our men; all the rest of our men were in a very dangerous fever. The second mate died four days after of a

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fever and his wound together. At this time only six hands are left alive. Our condition is to be pitied. We were fourteen days at sea before we reached *Bimbia*, where the *Neptune* is lying. I have buried the boatswain since my arrival here. I am sorry to inform you that there are only five left alive in the ship, and I cannot get one man here, nor in *Calabar*, nor at *Camaroons*; and what to do I do not know. We are all very sickly. We have on board at present about 6 tons of ivory, 6 puncheons

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puncheons of palm oil, 2 puncheons of pepper, 2 casks of bees-wax, till I get to *Gaboon*, where our wood is. The blacks plundered the ship of all our clothes and several other things which I cannot mention: and our cabin stores are all done; but that I do not mind if I only had men to get the ship to *Gaboon*, to get our wood. (Signed) *G. Skelton.*" The following letter was the only intelligence communicated to the underwriters at the time of effecting the insurance in *September* 1800. It was from *Skelton* to Mr. *Tipping*, dated *Gaboon River, April* 21st, 1800. "Sir, This comes to inform you that we arrived in *Gaboon River* on the 24th of *March*, and have only got on board one-third of our red-wood, and the most part by our long boat. The natives on shore finding us weakly handed, and our goods taken from us, do as they please. I have nine men on board now: but our provisions run very low. You may think the trouble and fatigue I have with the natives on shore; and I do not expect to get all my wood till the latter part of next month: then you may expect my sailing. The wood in general is in very small billets. The ivory, palm oil, bees-wax, and pepper, I made mention of *in my last letter*. I got 5000 billets of choice wood from *Prince William* side, every billet as big as four of the billets at *Batavia* side. It is a very hurt to me staying so long here; but I do my endeavour to get [460
the wood off, &c. (Signed) *G. Skelton.*"

Sir *V. Gibbs* and *Littledale* shewed cause, and argued that the last letter containing the latest intelligence, was the most material to be shewn to the underwriters; as the question was, whether a true representation of the state of the property at the time of the insurance effected, as far as it was known to the assured, was made; and not, whether information of prior difficulties or dangers, which had been overcome and were passed, had been suppressed. That there was a reference in the last to the former letter, which was sufficient notice to the underwriters to enable them to call for that letter if they wished for further information respecting the ship.

Park and *Morrice*, contrà, contended that the suppression of the first letter was material, not only because it explained all the causes of the distress represented generally in the second letter; but because it might be inferred from the latter that the ship had first arrived on the coast on the 24th *of March*, instead

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instead of having been there many months before. And it was not enough that it referred to a former letter; for that might have been written after the ship's arrival in *Gaboon River* on the 24th of *March;* and it is the first letter only which refers to prior transactions. And of these it was important that the underwriters should be informed, as the policy was to take effect from an antecedent time, and average losses might have been incurred. The second letter does indeed mention the ship being weakly handed, but it says nothing as to the murder of the captain and several of the crew; the sickliness of the rest; and
[461] the difficulty of getting more hands; all which enhanced the future danger, and would have made the ship almost uninsurable: at least the underwriters ought to have had an opportunity of exercising their judgment upon it. And this, they said was not like *Haywood* v. *Rodgers*, (*a*) where it was ruled, that there being an implied warranty by the assured of sea-worthiness in every assurance, it was not necessary for him to disclose any facts, unless demanded, which formed an ingredient in sea-worthiness. [*Lawrence* J. having asked, whether there were not equally an implied warranty that at the time of the insurance directed there was a sufficient crew, rigging, and provisions to navigate the ship for the purposes of the voyage insured? They answered] That the period of implied warranty was at an end in this case when the first letter was written; for the insurance was *at and from* 24 *hours* after her arrival at her first place of trade on the coast of *Africa:* the warranty would therefore be complied with by the ship being properly equipped and manned for the occasion at that period: and therefore any subsequent defects or misfortunes which enhanced the risk after that time, and which were known to the assured at the time of effecting the insurance, were the proper subjects of representation, and ought to have been disclosed.

Lord ELLENBOROUGH C. J. In every case of this sort it is necessary that there should be a full and fair disclosure of all the material circumstances affecting the actual state and condition of the ship at the time of the insurance effected. And the question is, whether that has not been made in this case;

(*a*) 4 *East*, 590.

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taking it for granted, as we must, that the underwriter was before cognizant of the course of the * trade, which was the subject of insurance. Now no underwriter is so little conversant with the *African* trade as not to know that it consists in truck, and that the ships engaged in it always continue for some time upon the coast; in some instances, as we learn from cases which have come before the courts, for above a year. Here the assured laid before the underwriters the latest account of the ship, in a letter dated from *Gaboon River* on the 21st of *April* 1800, by which it appeared that the ship arrived *in Gaboon River* on the 24th of *March* preceding, and had then on board part of her homeward cargo. It was open to them to inquire, if they thought it material, whether that were her first arrival, or how long before she had arrived on the coast; for the insurance was during her stay and trade there: but the fair inference from the letter is, that she had been upon the coast for some time before; for the writer refers to different articles of the cargo of which he had made mention in his LAST *letter;* it is not even said his *first* letter, so that there might have been several written before: but at least it referred to the other letter, the letter in question. Then the writer states, that the natives on shore, finding them weakly handed, did with them as they pleased. It must be collected from this that they were at the mercy of the natives, and consequently that the risk was hazardous: and this indeed is evinced to have been the feeling of the underwriters by the largeness of the premium. Then the writer says, that he has *nine* men on board *now*, *but* that their provisions run very low. What is that but contrasting the *then* number of his crew, as if greater than it had been before, with the present low state of his provisions. He then discloses the continuing differences with the natives; and afterwards refers to the mention he had made in his last letter of different articles of his homeward cargo; importing that he had in that letter made a full disclosure of all that related to it. If then the underwriters wished for further information as to prior circumstances, they should have asked for that letter, of the existence of which they thus had notice: and if, when demanded, it had been withholden from them, the observation made in *Haywood* v. *Rodgers* might have applied. Here however the assured disclosed every thing which he

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he knew as to the existing state of the ship at the time: it was a true statement of its then actual situation; and it suggests a former communication, so as to put the underwriters upon further inquiry if they thought it material. The ship was stated to be weakly handed, which was the material fact; and whether that had been before occasioned by the sabre or by sickness could not then signify. The former letter would not have communicated in substance more than the underwriters had information of. There was therefore no concealment of any thing material.

GROSE J. The policy is impeached upon the ground of concealment of material information from the underwriters: but it is admitted that the letter which was shewn to them disclosed the actual state of the ship at the time it was written: and refers to a former letter, as shewing its former different condition. The writer mentions that the natives *finding them weakly handed and their goods taken from them,* (which evidently alludes to some former communication) did as they pleased with them: and he says he has nine men *now,* which, contrasted as it is with the then low state of their provisions, shews that their condition in respect of the number of the crew was better than it had been. The underwriters might
[464] have seen the former letter referred to, if they had thought proper to call for it. I cannot say therefore that there has been any unfair concealment, when the letter which was communicated to them contained a fair account of the then state of things, and they had or might have had if they had thought it material, the account of the prior condition of the ship.

LAWRENCE J. On the first reading of the letter shewn to the underwriters I thought it implied that the ship had only arrived on the coast on the 24th of *March;* but on looking again at it no such inference can be drawn from it. It certainly cannot be necessary in order to effect an insurance to detail to the underwriters all the previous proceedings of the ship: but it is sufficient that the letter shewn to them represented truly the then state of the ship, and referred to the former letter. He here commented upon the terms of the second letter, as shewing its reference in different parts to a former account: and particularly from its stating the arrival of the ship at *Gaboon River,*

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River, (not saying *on the coast*) on the 24th of *March*; that their provisions were so much reduced; that the several articles of lading enumerated had been taken in; and that they expected to sail homewards at the end of the next month, which was supposing that their stay and trade on the coast would not be above two months; that the underwriters must have collected that the letter was written towards the latter end of such a voyage, which is known to be of several months duration; and that they could not have understood that the first arrival of the ship on the coast of *Africa* was on the 24th of *March*. If then they wished for further information as to the time when she first arrived, or of the cirumstances which had occurred to place her in the condition described in the second [465] letter, it was their own fault that they did not call for it, when the letter they saw referred to a former letter.

LE BLANC J. The ground of the motion for a new trial was, that as the underwriters were to be upon the policy 24 hours after the ship's arrival on the coast of *Africa*, it became material to them to know whether they had been a twelvemonth upon the policy, or only from the 24th of *March* preceding the insurance in *September*. The policy however was not at and from the river *Gaboon*, but at and from the ship's arrival on the coast of *Africa*, and therefore the mention of the ship's arrival in that river on the 24th of *March* did not imply that it was her first arrival on the coast; and the comments which have been made on the contents of the second letter shew that the underwriters could not have collected that from it. And as that letter referred to the former one, the underwriters, if they wished to know particularly when the ship had arrived on the coast, might have called for the former letter. Though it was fairly to be inferred from the circumstances mentioned in the letter which was shewn to them, that the ship had arrived on the coast before the 24th of *March*.

Rule discharged.

The

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An order of removal directed to "*the Parish of Poole*, or town and county of *Poole*," is sufficient, though the proper name of the parish be *St. James in Poole;* there being no other parish in the town and county of *Poole*. An apprentice to a ship owner living at *A.* gains a settlement by residing on board his master's ship for 40 days in *B.* while the ship was staying and trading there in the course of his master's trade and employ upon a coasting voyage. And if the apprentice afterwards upon the bankruptcy of his master, return to *A.* where he formerly resided with his master as at his home, and finding that his master had absconded, live there with a relation, without doing any further service there for his master; such residence, though for more than 40 days before his apprenticeship expired, will not regain him a settlement in *A.*

TWO justices of the county of *Devon* made an order for the removal of *John Cotter*, mariner, from the parish of *Topsham*, in the same county to *the parish of Poole or town and county of Poole;* which order was addressed to the churchwardens and overseers of the poor of the parish of *Topsham* in the county of *Devon*, and to the churchwardens and overseers of the poor of *the parish of Poole or town and county of Poole;* and adjudged the settlement to be in the latter place by the same description. An appeal was lodged against this order by the parish officers acting for the town of *Poole*, to whom the pauper was delivered with the order: and before the merits of the case were gone into on the hearing of the appeal, the appellant's counsel objected to the order for its uncertainty, and in other respects; and it was proved, and was stated in the case afterwards reserved, that there was no such parish as the parish of *Poole;* that the town and county of *Poole* consisted but of one parish, and that the name of that parish was *St. James's in Poole*. The Sessions however overruled the objection, and proceeded upon the merits; and finally quashed the order, subject to the opinion of this Court upon the following case; in which was also included a statement of the facts above mentioned, relating to the objection to the form of the order.

The pauper *John Cotter*, at the age of 12 years was bound by indenture apprentice as a mariner to *D. Sweetland* of *Topsham*, ship-owner and coal merchant. He served his said master for three years, during which he made several voyages, and returned to *Topsham;* residing there in the intervals between the voyages sometimes for two months. His last voyage was on board the *Reward* of *Topsham*, which sailed first to *Shields* and from thence to *Poole* with a cargo of coals. The pauper remained at *Poole* upwards of 40 days, and slept every night

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during that time on board the said vessel as it lay along-side the quay. He knew whilst he was there that his master was become a bankrupt, and gone from *Topsham;* in consequence of which he applied to Mr. *Penny*, the agent and consignee of the vessel, for money, to enable him to return to *Topsham*, who supplied him with half-a-guinea for that purpose. On his arrival at *Topsham* he resided with his uncle, not being able to find his master, whom he has never seen or served since. The indentures were offered to be given up by one of the assignees of *Sweetland;* but were not in fact given up until after they expired.

Burrough and *Pell*, in support of the order of Sessions, contended, 1st, that the residence of the apprentice at *Poole* was merely casual and accidental, the vessel in which he served being there in transitu, and its proper home being at *Topsham*. That in *Rex* v. *Burton Bradstock*, (*a*) where an apprentice was holden to gain a settlement by serving his master for above 40 days in *Bridport* harbour, which is within the parish of *Burton Bradstock*, the Judges relied on the circumstance that the home of the ship was there. That it would be very inconvenient in these cases if the settlement of sea-faring apprentices were to be shifting backwards and forwards in every port to which they came, though but for a day, if upon the whole they had slept [468] there 40 nights during the subsistence of the indentures. That the doctrine of casual residence in a place for 40 days not giving a settlement there was confirmed in *Rex* v. *Alton*, (*b*) where a servant's serving his master for the last 40 days of his year at a watering-place (*Scarborough*) being considered only as a sojourner, and not an inhabitant, did not give him a temporary settlement there: and that the general doctrine of that case, as to casual residences, was not denied in *Rex* v. *Bath Easton*. (*c*) 2dly, They contended, that at any rate the apprentice regained a settlement in *Topsham*, whither he returned after he had left *Poole* by the assistance of his master's agent, and served out the remainder of his time there, (*d*) which was the original home of himself and his master: and that actual

(*a*) *Burr. S. C.* 531.

(*b*) *Burr. S. C.* 418. and vide S. C. *Burn's Just.* tit. Poor. (Sett. by Service.)

(*c*) *Burr. S. C.* 771. (*d*) *Rex* v. *Brighthelmstone*, 5 *Term Rep.* 163.

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service to the master was not necessary; but the indentures still subsisted in point of law, notwithstanding the bankruptcy of the master. (*a*) 3dly, They objected that the order was improperly directed to the parish of *Poole*, or town and county of *Poole*, when the proper name of the parish was *St. James's in Poole:* and that even if the error were amendable at the sessions by the statute, they had not amended it, but overruled the objection.

East and *Lyon* contrà were stopped by the Court.

The Court were clearly of opinion against the parish of
[469] *St. James's in Poole* upon all the points. As to the 1st, they all agreed that the residence of the apprentice on board his master's ship in *Poole* was not a casual or accidental residence; but he was then in the actual employ and service of his master in his trade and business, which in its nature required a shifting residence. That the principal doubt made in the case of *The King* v. *Burton Bradstock*, was, whether the residence of an apprentice on board a ship were equivalent to a residence on shore in the same parish; and what was thrown out by the Court there, in respect of *Bridport* harbour being the home of the ship, was principally in answer to that objection. And that the doctrine of casual residence, as applied to places of public resort, which had been thrown out in the *Scarborough* case, was pretty much shaken in the subsequent case of *Bath Easton*. That at any rate, however, the doctrine did not apply to a case like the present, where the apprentice was in the actual service of his master at the time. And as it was clear that an apprentice might gain a settlement by serving another master in a different parish, by the consent of his original master, a fortiori he gained a settlement by serving the original master himself in another parish, where his master's business called him. (*b*) Upon the second

(*a*) Vide *Buckington* v. *Shepton Bechamp*, 1 *Stra.* 582. and 2 *Ld Ray.* 1352. and S. P. as to Servants. *Rex* v. *St. Andrew, Holborn*, 2 *Term Rep.* 627.

(*b*) See the Huntsman's case, *Bishop's Hatfield* v. *St. Peter's* in *St. Albans*, fol. 197. referred to and commented upon by Lord *Mansfield*, in *Alton* v. *Elvetham*, *Burr. S. C.* 423-4. Also the case of the servant of the *Oxford* stage-coachman, *St. Peter* in *Oxford* and *Chipping Wicomb*, 1 *Stra.* 528. Also the groom's case, *East Ilsley* v. *Weybridge*, *Burr. S. C.* 722.

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point, it appeared by the case that the apprentice never returned to his master's service in the parish of *Topsham*, for his master had absconded before his return; but he went to live with his uncle: and it is expressly found that he * never saw or served his master afterwards. (*a*) In *The King* v. *Brighthelmstone*, the apprentice returned *to his master* again in the original parish. As to the third point, they said there was no objection to the description of the *parish of Poole*, omitting the mention of its tutelary *Saint;* there being but one parish in the town and county of *Poole*, and *Poole* being the common name of the place. And that the parish officers of *Poole* had themselves considered this description sufficient to call upon them to appeal to the sessions against the order, by whom the objection to the misnomer had been overruled. (*b*)

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Order of Sessions quashed, and original order confirmed.

(*a*) Vide ante, 381. *Rex* v. *Barmby-in-the-Marsh.*

(*b*) Vide *Rex* v. *Madley*, *Burr. S. C.* 202. *Rex* v. *Andover*, *Cald.* 373. *Rex* v. *Ulverstone*, 7 *Term Rep.* 564. and *Rex* v. *Harrow-on-the-Hill*, 2 *Const's Bott.* 828. 3d edit. tit. *Appeal to the Sessions.*

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The pauper desired her mother to look out for a place for her, and the mistress on the application of the mother some time before *Old Michaelmas* said that she would give the pauper the same wages as her other servants, and wait till she came; but the mother made no absolute agreement for her daughter, though she informed her that she had got a place for her if she liked it. About a week after *Old Michaelmas* the mistress applied to the pauper to know if she liked to come into her service, and they then agreed for the first time for certain yearly wages (the same as the other servants) *with liberty of quitting at a month's wages or warning*: held that the hiring commenced only from the day when the pauper and her mistress agreed on the terms specified, and not from *Old Michaelmas* or before, when the mother spoke to the mistress. And the pauper having given a month's previous notice to quit at *Old Michaelmas*, which the mistress accepted, and procured another servant to come on that day, when the pauper received her whole year's wages: but upon the mistress telling her that she expected a week of service in her year, she offered to stay out the week: to which the mistress said that it did not signify, as she had got another servant in her power: held that this was a dissolution of the contract before the end of the year, by the notice to quit given and accepted, and not a mere discontinuance of the service; and consequently no settlement was gained by such hiring and service.

TWO justices, by an order, removed *Susannah White*, single woman, from the parish of *Wiston* in the county of *Sussex*, to the parish of *Rushall*, in the county of *Wilts*. The sessions on appeal confirmed the order, subject to the opinion of this Court upon the following case.

The pauper being 30 years of age, and a native of *Wiltshire*, and her mother and other relations living near *Rushall*, some time before *Old Michaelmas-day* 1802, the time at which the service in which she was then living at *Wiston*, in *Sussex*, was to end, wrote to her mother, desiring her to look out for a place for her; which she did, and in consequence treated with the wife of the Rev. *K. Peck*, of *Rushall, Wiltshire;* upon which Mrs. *Peck* informed the mother that she would give her daughter the same wages as she did to her other servants, (being 10 guineas a year, and a guinea for tea,) and wait till she came down, and desired that she would come as quickly as she could; but the mother made *no absolute agreement* for her daughter, but afterwards informed her that she *had got* a place for her *if she liked it*. The pauper left her service in *Wiston* immediately on its expiration, and went into * *Wiltshire* without delay, and arrived on *Saturday* the 16th of *October* at her mother's near *Rushall;* and on *Monday* the 18th Mr. *Peck* applied to her to know if she liked to come into his service, saying that he wanted her to come immediately, as he had company to dinner. She went

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to Mrs. *Peck*'s house, and then it was for the first time agreed between Mrs. *Peck* and her, that the wages should be 10 guineas for the year and a guinea for tea, (which was the same as she had given to her other servants) with liberty of parting at a month's wages or a month's warning. She then went to work, and continued in Mrs. *Peck*'s service until *Old Michaelmas-day* following. About five weeks before that time she gave her mistress notice that she should quit her service at the next *Old Michaelmas-day*. On the said *Old Michaelmas-day* 1803 the pauper came to her mistress to receive her wages, who paid her her whole year's wages, and the guinea for tea; but told her she wanted a week of serving out her year. The pauper said she was willing to stay another week; but the mistress replied that it did not signify, as she had got another servant in her place, who was then in the house, (which she in fact was.) She then left the house, and never returned into the service afterwards. Upon which facts the court of quarter sessions were of opinion, that the pauper was settled at *Rushall*.

Topping and *D'Oyley*, in support of the order of sessions, contended, 1st, that the mother was to be considered as the agent of her daughter, and that she had made an agreement for her with Mrs. *Peck* before *Old Michaelmas-day*, though reserving to her daughter the option of dissent if she did not like the service, (which was the meaning of the finding that the mother made *no absolute agreement*, &c.) but as the daughter ultimately approved of her place, that which was at first a conditional became an absolute hiring before *Old Michaelmas*, though her approbation were not signified till afterwards. And this was not varied by the subsequent stipulation for liberty to either party to part at a month's wages or a month's warning, such liberty not having been acted upon till the end of the year from the original hiring. And they said there was nothing unreasonable in the reservation by the mother of an option for her daughter to dissent from the contract, while the mistress was at all events bound if the daughter approved of the place; because the daughter was to come from a great distance at her own expence. But 2dly, supposing the contract of hiring not to have commenced till the 18th of *October*, still a settlement would be gained; for when the mistress observed that the pauper had not served out her year by a week, she offered to stay another

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week in the service; and her mistress telling her it did not signify was a dispensation of the service for the remainder of the year; which distinguishes this from the cases of *Rex* v. *King's Pyon*, (*a*) and *Rex* v. *Sudbroke*: (*b*) and that is confirmed by the mistress having paid the whole year's wages, though that alone would not be decisive. Then the month's notice to quit given by the pauper previous to *Old Michaelmas-day* is no evidence of her intention to quit the service before the end of the year, as it was given under a mistake that the year ended at that time; and as soon as it was objected to by the mistress, it was abandoned by the pauper. And they said, that this was a stronger case of dispensation of service than *Rex* v. *Richmond*, (*c*) where a footman left his service 13 days before the end of his year, because another servant, whom he had lately married, was then going away; his master having no objection, as he had another footman coming. Or than *Rex* v. *St. Bartholomew, Cornhill*, (*d*) where on the master's intended change of residence he told the servant to look out for another place; and she went into a new service before the end of the year. And they compared it to *Rex* v. *St. Philip* in *Birmingham*, (*e*) where the servant having given warning eight days before to quit at the end of his year, the master discharged him the same day, paying him his full year's wages; though the servant was willing to stay to the end of his year: which was holden to be a dispensation only of the service, not a dissolution of the contract.

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Sir *V. Gibbs* and *Courthorpe*, contrà, were stopped by the Court.

Lord ELLENBOROUGH C. J. Upon the first point, if the justices had found as a fact from what time the hiring commenced, the case would have been clear; but as they have not done so, we must draw the inference from the facts stated. The mother being desired to look out for a place for her daughter, applied to Mrs. *Peck* of *Rushall*, who informed her that she would give her daughter the same wages as her other servants, and would wait till she came; but the case expressly states that the mother made *no absolute agreement* for her daugh-

(*a*) 4 *East*, 351. (*b*) Ib. 356.
(*c*) *Burr. S. C.* 740. 2 *Const's Bott.* 514. 3d. edit.
(*d*) *Cald.* 48. (*e*) 2 *Term Rep.* 624.

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ter. And indeed there was nothing at that time said about the quantum of the * wages, or the time of service, or about the warning, afterwards introduced into the contract, on which either might relinquish the contract. The daughter arrived at *Rushall* about a week after *Old Michaelmas-day*, when upon Mr. *Peck*'s application to her to know if she liked to come into his service, she went there; and *then* it was, as the case states, for the *first* time *agreed* between Mrs. *Peck* and her, that the wages should be 10 guineas for the year and a guinea for tea, with liberty, which was not before mentioned, of parting at a month's wages or a month's warning. This was on the 18th of *October*. Then about five weeks before *Old Michaelmas-day* the pauper gave her mistress notice to quit at *Old Michaelmas-day*. The mistress could not object to receive the notice, and therefore looked out for another servant: but when the pauper went to receive her wages, the mistress paid her the whole year's wages, but told her that she wanted a week of serving out the year. The pauper then said indeed that she was willing to stay another week; but as the mistress, in consequence of the warning which the pauper had given her, and which she had accepted, had provided herself with another servant, and did not want two of them, she told the pauper that it did not signify, as she had got another servant in her place: on which the pauper left the house. There can be no doubt upon this statement that both parties agreed to put an end to the contract before the end of the year. The servant gave above a month's warning to quit at *Old Michaelmas*, which she had a right to do, and the mistress accepted the warning, and both parties acted upon it. And this it appears was in fact before the end of the year, whatever the servant might have supposed when she gave the warning. Now the rule which the Court has laid down as the test whether the circumstances attending the departure of a servant before the end of the year amount to a dissolution of the contract, or only to a dispensation of the service, is whether the master has the power afterwards of compelling the continuance of the service: if he have not, there is an end of the contract: if he have, but choose to dispense with it, it is a dispensation. If, after this, any person had harboured the servant when the mistress desired her services, could she have maintained an action for it? Certainly not:

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not: and that is a fair test that the relation of master and servant had ceased to exist.

GROSE J. The hiring in this case did not commence till the 18th of *October*, and consequently the year would not expire till the 18th of *October* following. But there was a liberty of parting at a month's wages or a month's warning; of which the servant availed herself, and gave due notice to quit at *Old Michaelmas-day*. The reason of that is obvious; for that is the usual time for hiring of servants in that part of the country, and she meant to look out for another place. The mistress considered it as good notice, and procured another servant to come to her on that day. Here then was a notice by the servant to quit a week before the end of the year, which was accepted by the mistress, and the servant quitted accordingly. It is clear then that there was not a year's service, and consequently no settlement gained by the pauper in *Rushall*.

LAWRENCE J. On the first ground, there is no pretence for saying that this was a hiring from *Old Michaelmas-day*. The daughter desired her mother to look out for a place for her,
[477] and she before *Old Michaelmas* treated with Mrs. *Peck* of *Rushall* on behalf of her daughter; but *no absolute agreement* was made at that time; nor was there any till the 18th of *October*, when *for the first time* it was agreed between Mrs. *Peck* and the pauper that the latter should have 10 guineas a year wages and a guinea for tea, with a liberty of parting at a month's wages or month's warning. That must be taken to be a contract to commence *from that time*, there being no reference to any antecedent time. And in truth both parties so considered it at the time of parting; for when the mistress, on paying her whole year's wages, told the pauper that she wanted a week of serving out her year, the latter did not dispute that, but in effect admitted it, and said that she was willing to stay a week longer. The mistress however stood, as she had a right to do, upon the warning which had been given, and said that it did not signify, as she had provided herself with another servant in her place, who was then in the house: on which the pauper accepted her wages, and went away before the end of the year. There is clearly therefore no settlement.

LE BLANC J. If the sessions upon this statement of facts had found this to be a hiring from *Old Michaelmas-day*, it would have

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have been bad. But it is now contended that the hiring commenced, not from *Old Michaelmas-day*, but from the day that the mother spoke to Mrs. *Peck:* but no agreement was then made; the mistress only told the mother what wages she gave, and that she would not fill the place which was vacant in her family till her daughter came, only desiring that she would come quickly. Then when the daughter did come the terms were settled, which had not been mentioned before. In the absence then of any reference for the commencement of the hiring to [478] the prior time when the mother spoke to Mrs. *Peck*, we can only say that it was a hiring from the time when the agreement was actually made, and the terms settled between the mistress and servant. Then on the second point; there was a liberty to part on a month's wages or a month's warning; which distinguishes this from all the other cases of dispensation of service, where the only duration mentioned was for the year. But here the servant had an option of determining the authority of the mistress upon a month's notice; which she availed herself of; and gave a month's notice to quit at *Old Michaelmas-day:* the mistress accepted the notice, not as being to quit at the end of the year, but as a month's warning. And though she gave the pauper the whole year's wages, yet she pointed out to her that she was not entitled to so much, because she wanted a week of serving out her year. The pauper did not deny that, but offered to stay out the week. However the mistress did not consent to that, as she had got another servant, in consequence of the other's notice to quit. The pauper therefore took her wages and departed before the end of the year.

Both Orders quashed.

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Friday, June 13th.

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Where the plaintiff declare upon a quantum meruit for work and labour done, and materials found, it is competent to the defendant, even without notice to the plaintiff, to prove that the work done was not worth so much as the plaintiff claims. And if it appear that the plaintiff has been paid on account as much as the work was worth, he cannot recover. And so it seems that the defendant may be let into such a defence where the contract was for the work to be done at a certain price; at least if he give the plaintiff previous notice of such defence, that he may be prepared to meet it. And, quære, if the work done be wholly inadequate to answer the purpose for which it was undertaken to be performed, whether the defendant may not be let into such defence even without notice.

ASSUMPSIT for work and labour done, and materials found, with the common counts. Plea non-assumpsit. At the trial before *Thompson* B. at the last *Exeter* assizes, the Plaintiff's witnesses proved that the Defendant, who was a farmer, employed the plaintiff, a carpenter, to do some work for him on his farm; and the plaintiff's workmen put on a roof on a linhay, and also roofed a barn; (the defendant finding the timber and nails;) and also made gates on the farm, and rails near the house: and the plaintiff demanded 3*l.* 14*s.* 7*d.* as now due, but his witnesses did not make out above 3*l.* On the part of the defendant it was stated, that it would be proved that the work had been done by the plaintiff in a very improper and insufficient manner; that the linhay was too weak in the roof; which, after being covered with thatch, sunk in the middle so as to let the water through; and that neither the rafters or roof of the linhay or the barn were sufficiently supported. And therefore it was contended, that the plaintiff was not entitled to recover what he now claimed, as remaining due to him. E contrà it was insisted that this was no answer to the action; but that if the work had not been properly done, it was the subject of a cross action by the defendant against the plaintiff. The learned Judge was inclined to have admitted the defendant into evidence of this defence; but upon the authority of a case of *Broom* * v. *Davis*, (*a*) which was cited, he rejected the evi-

dence

(*a*) *Broom* v. *Davis*, *Taunton Lent* assizes, 1794. cor. *Buller J.*—— *Assumpsit* for the price of erecting a booth on *Bath* race ground. The plaintiff proved that the measure of the booth was settled between him and the defendant; that he was to have 20 guineas for building it, five of which were paid before hand, and to take back the materials after the races; and that he did build it according to the stipulated dimensions.

dence proposed; and the plaintiff recovered a verdict for 3*l.* with liberty to the defendant to move this Court for a new trial; which was moved accordingly in *Easter* term last by *Jekyll*, who said that there were contradictory decisions upon the point. *Buller* J. in the case alluded to, having rejected the evidence of inadequate execution of the work contracted for at a certain price. But in *Duffit* v. *James*, at the sittings at *Westminster*, in *June* 1788, which was an action to recover the amount of a surgeon's bill, Lord *Kenyon* permitted the defendant to give evidence of unskilful treatment of him by the plaintiff: taking the distinction where the demand was for skill, where the question might be, whether the plaintiff were entitled to any thing or nothing; and where the action was for goods sold and delivered, or other certain thing of value, not depending on skill: and considering the case in judgment before him as a mixed question, where the demand was in part for skill as well as for medicine. There was also another case of *Cormack* v. *Gillis*, *Middlesex* sittings after *Easter* 1788. In [481] assumpsit for goods sold and delivered the case was, that the plaintiff was a seedsman, and sold to the defendant who was a gardner, seeds, with a warranty that they were of the sorts and quality for which they were sold. *Buller* J. held that the plaintiff was entitled to recover the price agreed on; and that the defendant was not at liberty to shew that the seeds were not of the sort, &c.; but must bring his cross action if the warranty were not complied with. And the plaintiff having recovered, *Gillis* did bring his cross action against *Cormack*, which was tried before Lord *Kenyon*, at the sittings in *Middlesex* after *Hilary* 1789; and in the course of the cause, what had passed on the former trial was mentioned to Lord *Kenyon*,

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dimensions. The defendant proved that the booth fell down in the middle of the races, owing to bad materials and bad workmanship, and that the plaintiff was fully apprised of both: and contended, that as the plaintiff had not built a booth to answer the purpose, he ought not to be paid the remainder of the 20 guineas. But *Buller* J. ruled, that this was no defence to the present action, especially as a particular sum was specified and part of it paid; though a cross action might be brought against the present plaintiff for building the booth improperly.

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who seemed to be of opinion, that the non-compliance with the warranty might have been given in evidence in the former action in reduction of the damages, or to shew that the seeds delivered were of no value. (*a*) A rule nisi having been granted,

Lens Serjt. now shewed cause. The action was brought for a common carpenter's bill by the plaintiff, who had employed workmen under him, whom he had paid for doing the work which was finished. If the work stipulated for were improperly done, the damage is recoverable in a cross action; but that is no objection to the plaintiff's recovering in this action the full value of the materials found, and labour employed and paid for by him. [*Grose* J. asked if there had been any particular sum agreed for; to which he was answered that there was not; that the plaintiff had only been employed generally as a carpenter to do the work.] The objection is not that the work directed to be done was not done, but that it was not properly executed. [*Lawrence* J. The plaintiff claims as upon a quantum meruit. Then if it can be shewn that the work was done ill, and was of no use to the defendant, will not that shew that the plaintiff does not deserve what he claims?] The cases before *Buller* J. establish a contrary doctrine. And he also mentioned a case of *Morgan* v. *Richardson*, as to the like effect, ruled by Lord *Ellenborough* at *Guildhall*. (*b*) Though no money

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(*a*) In addition to the above cases I have been favoured with another, which, together with those already mentioned, were taken by a gentleman at the bar. *King* v. *Boston*, *Middlesex* sittings after *Easter* 1789. The plaintiff had sold to the defendant a horse, warranted sound, for 12 guineas, of which the defendant had paid three. In fact, the horse was not sound; and the defendant refusing to pay any more, this action was brought for the value of the horse sold, to recover the difference. It was proved that the horse, at the time of the sale to the defendant, was not worth more than 1*l.* 11*s.* 6*d.* and the defendant afterwards sold it for 1*l.* 10*s.* Lord *Kenyon* held that the plaintiff could only recover the value; and more having been paid to him by the defendant, he nonsuited the plaintiff.

(*b*) This latter case was, however, explained by gentlemen at the bar to be an action upon a bill of exchange given for the price of some hams sold by the plaintiff to the defendant, which were sent to the *East Indies*, and turned out to be very bad. And the defendant attempted to set up his defence in this action upon the bill, which the Lord

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money has been paid into court, yet the plaintiff's bill was originally 16*l.*, and all the rest of it, except what is sought to be recovered in this action, has been paid on account; which is equally an admission of the contract. [*Lawrence* J. The defendant has probably paid as much as he thinks the work done is worth; and if he be right, this is an attempt to recover more than it is worth. *Grose* J. There being no precise agreement for any certain sum, the plaintiff was obliged to prove the value of the work done. Then why should not the defendant be permitted to meet that with contrary proof? And here the evidence offered was to shew that the plaintiff had been already paid as much as his work was worth.] He then observed that this sort of defence was a surprise upon the plaintiff.

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Lord ELLENBOROUGH C. J. In some cases the plaintiff may not be prepared to meet an objection of this sort at the trial; but it does not appear here what had previously passed upon the subject between the parties. Where a specific sum has been agreed to be paid by the defendant, the plaintiff may have some ground to complain of surprise, if evidence be admitted to shew that the work done and materials provided were not worth so much as was contracted to be paid; because he may only come prepared to prove the agreement for the specific sum and the work done, unless notice be given to him that the payment is disputed on the ground of the inadequacy of the work done. But where a plaintiff comes into court upon a quantum meruit, he must come prepared to shew that the work done was worth so much, and therefore there can be no injustice to him in suffering this defence to be entered into, even without notice. And that used to be the practice before Mr. Justice *Buller*.

GROSE J. The plaintiff in this action must at all events have been prepared to shew what he was entitled to receive for the work done; and therefore the defendant ought to have been let into his defence.

Lord Chief Justice thought could not be done, and the plaintiff recovered. But it was observed that that case turned upon the giving of the security; in addition to which it was said by another gentleman at the bar, that in that case also money had been paid into court, which admitted the bill of exchange declared upon.

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LAWRENCE J. In the case of *Brown* v. *Davis*, where there had been a specific sum agreed to be paid, there might be more reason for saying that such a defence would be a surprise upon the plaintiff; and there the rule laid down by Mr. Justice *Buller* may be a good one, if the plaintiff has had no notice of the kind of defence intended to be set up against his demand. But even there, if the plaintiff have previous notice that the defendant means to dispute the goodness or value of the work done, I think the defendant ought to be let into his defence. For, after all, considering the matter fairly, if the work stipulated for at a certain price were not properly executed, the plaintiff would not have done that which he engaged to do; the doing which would be the consideration of the defendant's promise to pay, and the foundation on which his claim to the price stipulated for would rest, and therefore, especially if he should have notice that the defendant resists payment on that ground, he ought to come prepared with proof that the work was executed properly. But where the plaintiff comes upon a quantum meruit, this defence can be no surprise upon him; because it is part of his case, and he must necessarily come prepared to shew what the work was worth.

LE BLANC J. I think that in either case the plaintiff must be prepared to shew that his work was properly done, if that be disputed, in order to prove that he is entitled to his reward; otherwise he has not performed that which he undertook to do, and the consideration fails. And I think it is competent to the defendant to enter into such a defence, as well where the agreement is to do the work for such a sum, as where it is general
[485] to do such a work. If a man contracted with another to build him a house for a certain sum, it surely would not be sufficient for the plaintiff to shew that he had put together such a quantity of brick and timber in the shape of a house, if it could be shewn that it fell down the next day: but he ought to be prepared to shew that he had done the stipulated work according to his contract. And it is open to the defendant to prove that it was executed in such a manner as to be of no value at all to him, or not to be of the value claimed.

Rule absolute.

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HOLLINSHEAD *against* WALTON.

Tuesday, June 17th

THIS action was tried on feigned issues under a private act of the 42 *Geo.* 3. for inclosing and allotting the commons and waste ground and mosses within the manor or township of *Egton-with-Newland*, in the parish of *Ulverstone*, in the county of *Lancaster;* and was brought in order to try the propriety of a determination of the commissioners under that act touching the plaintiff's claim to right of common of pasture, and of cutting and taking brackens upon the commons and waste grounds within the manor, in respect of his ownership of certain freehold lands and tenements, about 177 acres in extent, situate within the township or division of *Mansriggs*, in the parish of *Ulverstone*, and contiguous or near to the manor or township of *Egton-with-Newland*.

The declaration consisted of two counts, the first reciting the plaintiff's claim, and the objection made thereto by the defendant and others interested in the said division, and in the determination of the commissioners thereupon; whereby the commissioners having taken into* consideration that the said plaintiff had then lately gotten an allotment of common for and in respect of his said freehold lands and tenements situate within the township or division of *Mansriggs*, by virtue of an act of the 39 *Geo.* 3. intitled "An act for dividing and inclosing the com- "mons, waste ground, and mosses within the town and hamlet "of *Ulverstone*," did adjudge that the plaintiff had established his claim only to such an allotment of the said commons and waste grounds within the manor or township of *Egton-with-Newland*, as would, together with the value of the allotment which he had then already gotten upon the commons and waste grounds within the town and hamlet of *Ulverstone*, make the whole of his allotment for his *Mansriggs* estates equal to an allotment for lands and grounds of the same value situate within the manor or township of *Egton-with-Newland*. And the first issue was, Whether the plaintiff were or were not entitled for and in respect of his said right of common to a larger allotment of the said commons and waste grounds within the manor or township of *Egton-with-Newland*, than would, together with the

The owner of a tenement may have two distinct rights of common for his cattle, levant and couchant, upon such tenement, upon different wastes in different manors under several lords; and therefore an allotment under one inclosure act, in lieu of his right of common upon one of such wastes, will not do away or lessen his claim for an equal allotment with other commoners, under a subsequent act for inclosing the other waste: semble aliter, if the different wastes had appeared to have been originally holden under the same lord.

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the value of the allotment he had already gotten upon the commons and waste grounds within the town and hamlet of *Ulverstone*, make the whole of the allotment for his *Mansriggs* estates equal to an allotment for lands and grounds of the same value, situate within the manor or township of *Egton-with-Newland*. The second issue was whether the plaintiff were or were not entitled in lieu of his said right of common to an allotment of the said commons, waste grounds, and mosses by the act intended to be divided and inclosed, according and in proportion to his estate and interest therein, without regard to, and without deduction or abatement for or on account of any allotment
[487] which he had before the making of his claim gotten upon the commons and waste grounds within the town and hamlet of *Ulverstone*. The plaintiff in his declaration asserted the affirmative of both these issues, which the defendant by his plea denied. The cause was tried at the last assizes at *Lancaster* before *Chambre* J., when a verdict was found for the plaintiff with nominal damages, subject to the opinion of the Court on the following case.

The parish of *Ulverstone* comprises divers manors and townships, or divisions, amongst others the town and hamlet of *Ulverstone*, the manor or township of *Egton-with-Newland*, and the township or division of *Mansriggs;* each of which three divisions have separate constables, and separately maintain their own poor and highways. The commons within the town and hamlet of *Ulverstone*, before the inclosure thereof, and those within the manor or township of *Egton-with-Newland*, adjoined upon each other, and the ancient inclosures of *Mansriggs* (which has no common or waste) lies contiguous in different parts thereof both to the commons of *Ulverstone* and of *Egton-with-Newland*. In the year 1736 *John* Duke of *Montague*, being then lord of the manor of *Egton-with-Newland*, purchased the manor of *Ulverstone*, and continued to be lord of both manors till the year 1749; but ever since that period, and before then, and further than living memory can trace, those two manors have been holden by and under different lords, and under different and distinct customs and services. The plaintiff and all former owners of his *Mansriggs* estates have *immemorially*, until the allotments hereinafter mentioned, used and enjoyed in right of such estates common of pasture for all commonable cattle levant and

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and couchant thereon, and the liberty of cutting and taking away brackens to be used and* consumed on the estate, upon the commons within the town and hamlet of *Ulverstone*, and upon those of *Egton-with-Newland*; and since the said allotment the plaintiff has continued to exercise the same in the said last-mentioned wastes. The plaintiff pays no rates, taxes, rents, or assessments whatsoever unto the manor or township of *Egton-with-Newland*, for or in respect of his said freehold lands and tenements situate at *Mansriggs*. Under the act of the 39 *G.* 3. for the inclosure of the commons and wastes in *Ulverstone* previous to his making his claims under the *Egton-with-Newland* act, he had claimed and gotten an allotment of common within the town and hamlet of *Ulverstone* of 29 acres or thereabouts, parcel of the common of *Ulverstone*, for and in respect of his said estate at *Mansriggs*, and in satisfaction of his rights thereon: being in proportion to his land-tax payable for the same; that being the rule of division mentioned in that act (pages 13 and 14.;) and which said allotment is the allotment referred to in the determination of the commissioners and in the issues. The question for the opinion of the court was, Whether the plaintiff were entitled to recover? If he were, the verdict to stand; otherwise the verdict to be entered for the defendant.

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Holroyd contended for the plaintiff, that he was not entitled to a less allotment in respect of his rights on the *Egton-with-Newland* commons for his *Mansriggs* estate, under the *Egton*-inclosure act, 42 *Geo.* 3., on account of his having previously obtained an allotment for the same estate on the *Ulverstone* commons under the *Ulverstone* inclosure act of the 39 *Geo.* 3.; for the rights of common on the several wastes were distinct, and holden under different lords, so that an allotment in respect of the one could be no compensation to the owner for the loss of the other, which he was equally entitled to enjoy, and had in fact continued to enjoy subsequent to the acquiring of the first allotment. And he referred to *s.* 27. (p. 13 & 14.) of the *Ulverstone* act, 39 *Geo.* 3. *c.* which directs the commissioners "to set out certain parts of the commons, waste grounds, and mosses thereby directed to be divided and inclosed, in proportion to the land-tax paid by all the owners of lands and tenements within the township or division of *Mansriggs*, and by such of the owners and proprietors, of lands and tenements, within

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within the several townships of *Osmotherly* and *Egton-with-Newland*, in the parish of *Ulverstone*, as are entitled to right of common upon the said commons, waste grounds, and mosses for their lands or tenements in respect of which they are entitled to such right of common, &c.; which parts so to be set out shall by the commissioners be allotted amongst the several owners of lands, &c. in *Mansriggs* aforesaid, and such owners of lands, &c. in *O.* and *Egton-with-Newland* who are entitled as aforesaid," &c. And he also referred to *s.* 29. of the same act, which provides " that nothing in this act contained shall extend to prejudice or affect the rights of the several owners of lands, &c. within the several townships or divisions of *Mansriggs* and *Egton-with-Newland*, or any of them, in and upon the commons, waste grounds, and mosses, within the said township or division of *Egton-with-Newland*, or any part thereof."

Lord ELLENBOROUGH C. J. called upon the defendant's counsel to shew some objection to the plaintiff's claim, as none occurred to the Court upon the statement of the case, from
[490] which it was to be collected that the rights of common claimed under the two inclosure acts for the plaintiff's estate of *Mansriggs* were in two different manors holden under two different lords. He said, that whatever objection might have arisen if the claim had been for a double compensation for a right of common in respect of the same estate on two several commons appearing to have been originally derived from the same lord; yet what objection, he asked, could there be to two distinct rights of common holden by grants under different lords?

Wood for the defendant said, that it did not appear by the case that the plaintiff claimed under several grants of rights of common by different lords; and that the natural and legal presumption was that the several manors and wastes were originally in the hands of the same lord, from whom the right of common over all was derived. And it could not be presumed that one lord would have granted a right of common over his own wastes to the tenant of another lord in another manor. And, assuming that the several commons were originally in the hands of the same lord, he argued that inasmuch as a writ of admeasurement of common of pasture would have lain in order

to

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to apportion to the tenant so much only of the common as he would have been entitled to for his beasts levant and couchant upon his tenement; therefore as he had already received compensation for his right out of one of the commons which had been divided and allotted under the *Ulverstone* inclosure act, he was not entitled to any additional allotment in respect of the same tenement under the *Egton* inclosure act. And he referred to *Fitzh. Nat. Brev.* 125. tit. *Writ of Admeasurement of Pasture*, in the notes to which it is stated that "if the defendant [491] has common appendant to his freehold in three vills, it may be admeasured for the lands in one of the vills. Temp. *Ed.* I. *Admeasurement*, 14." And also to *Tyrryngham's* case, 4 *Rep.* 36. *b.*, the second resolution, 37. *b.*

Lord ELLENBOROUGH C. J. The argument proceeds upon assuming a fact which does not appear in the case; and indeed as far as any thing does appear it must be intended that the several rights of common in the different wastes were holden under different lords; for it is stated that they came into the hands of the same lord by purchase in 1736, and so continued till the year 1749: but that both before and since, and beyond living memory, they were holden under different lords. The usage then, from which alone in the absence of any direct evidence of the fact we can make any presumption, shews that these rights were enjoyed under different lords. And if so, there can be no doubt that a man may have two distinct substantial grants of rights of common over different wastes from different lords in respect of the same tenement. It may be advantageous to him to change his pasture from time to time for his cattle levant and couchant upon his tenement; and immemorial usage is evidence of such distinct grants: for I lay no stress on the short interval of using the *Egton* commons after the *Ulverstone* inclosure act, and before the recent inclosure. If indeed it had been shewn that the right over both commons had been originally granted by the same lord, that might have been a reason for a different construction. In this case therefore the allotment which the plaintiff received under the first inclosure act was only a satisfaction for his right of common on the wastes thereby directed to be inclosed: and he still retained the same right on the *Egton* commons belonging to a [492] different manor which the other commoners there enjoyed,

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and is therefore entitled to a proportionable compensation with them.

The other Judges concurred: and

LAWRENCE J. suggested by way of explanation of the passage cited from the notes in *Fitzh. Nat. Brev.*, that it might be taken that the freeholder claimed common appendant in three vills under the *same* lord: and it might happen that other tenants of the lord had only common in one of the vills; in which case if he who had common in all the three turned on all his cattle in one of them, it would prejudice those whose right of common was confined to that one, and they might sue out their writ of admeasurement to apportion the number of his commonable cattle in that one vill.

Postea to the Plaintiff.

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Friday, June 13th.

STILES *against* NOKES. (*a*)

It is libellous to publish a highly coloured account of judicial proceedings, mixed with the party's own observations and conclusions upon what passed in court, which contained an insinuation that the plaintiff had committed perjury: and it is no justification to such insinuation of perjury against the plaintiff (who had sworn to an assault by *A. B.* on him) that it *did* appear (which was the suggestion in the libel) *from the testimony of every person* in the room, &c. *except the plaintiff*, that no violence had been used by *A. B.* &c.; for non constat, thereby that what the plaintiff swore was false. Neither is it sufficient in a justification to such a libel, where the extraneous matter was so mingled with the judicial account as to make it uncertain whether it could be separated, to justify the publication by general reference to *such parts of the supposed libel as purport to contain an account of the trial*, &c. and that the *said parts* contain a just and faithful account of the trial, &c.

THE Plaintiff, an attorney of this court, brought his action on the case against the Defendant for a libel, and declared that whereas he was always until the publishing of the several false, scandalous, and malicious libels after mentioned reputed to be a person of good name, &c. and had never been guilty nor until, &c. suspected of perjury and other such crime. And whereas the plaintiff before and at the time of the publishing of the said libels was, and still is one of the clerks of a certain Court of Justice, &c. viz. the Court of Requests for the borough of, &c. And hath during that time carried on the office and employment of such clerk with integrity, and hath

(*a*) This case was discussed in court under other names.

never

never been guilty or until the publishing the said libels ever been suspected to have been guilty of delinquency in his said office and employment; &c. Yet the defendant, well knowing the premises, but maliciously intending to injure the plaintiff in his good name, &c. and in his said office and employment, &c. and to cause it to be believed that the plaintiff was guilty of perjury, &c. and also of delinquency in his said office and employment, &c. on, &c. at, &c. did falsely and maliciously compose and publish in a certain newspaper called, &c. a certain false, scandalous, and malicious libel of and concerning the plaintiff *in his aforesaid office and employment of such clerk to the said Court of Requests as aforesaid;* in which are the following false, scandalous, and malicious words: "Judicial delin- [494] "quency, (meaning the delinquency of the plaintiff in his said "office and employment, &c.)—Quarter Sessions. *The King* "against *Stiles*, (meaning the plaintiff). There are few things "for which the present times are more remarkably pregnant, "as they undoubtedly are with strange events, than for the "number of prosecutions which have recently been instituted "against persons sustaining the high and certainly honourable "character of Judges. Both the old and the new world have "astonished their inhabitants with this phœnomenon, &c. "Little did *we* apprehend that the town of ——would add to "the list of judicial delinquents; such however has been the "case. At the late sessions for this borough a prosecution "was brought forward on *Wednesday* last against Mr. *Stiles*, "(the plaintiff,) a well-known attorney of this town, and chief "justice of the high court of conscience here, (meaning the "plaintiff, clerk as aforesaid to the said court of requests, &c.) "for a savage, unprovoked, and brutal attack, as stated by "the counsel, on *A. B.*, &c. In the opening of the case it "was stated, and afterwards clearly established by evidence, "that the said Mr. *Stiles* (the plaintiff) did wantonly and savage- "ly attack *A. B.* at an arbitration, &c. It appeared that "though Mr. *Stiles* had on this, as well perhaps as on former "occasions, most to say, yet he had not the best of the ar- "gument, and fearing that he would be professionally foiled, "he had instant and insidious recourse to blows, which were "administered with no ordinary violence or treachery. *A. B.* "being inferior in corporeal powers urged Mr. *Stiles* to desist;

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" at the same time declaring that upon equal terms he had no
" personal * fear of him, but that he felt the indignity and de-
" gradation of opposing himself in such a low and brutal man-
" ner, or indeed in any manner to a person whom he would
* [495] " not consider either from his education or habits entitled to his
" respect, or worthy of his notice." (Here followed a statement in the libel, as if proved by *C. D.* a witness called by the plaintiff, imputing cowardice to the plaintiff, and that he, the witness, had heard *E. F.* make mention of it. On which the plaintiff started from his seat; and then the libel set forth a ludicrous conversation between *E. F.* and the plaintiff, ending with a suggestion from the plaintiff to drop further mention of the matter; on which the libel went on to state;) " This
" suggestion extorted from the party mentioned a look of con-
" tempt which *we* shall leave to the painters to describe, &c.
" At this moment Mr. *Stiles*'s agitation became visible, at least
" *we* thought so; and for the first time in our lives we saw or
" suspected a *suffusion*. Apparently aware of the approaching
" issue of the trial, and almost on the instant of being pronoun-
" ced guilty by a jury of his country, he, the plaintiff, bustled out
" of court, reduced to a condition in which ordinary meanness
" or brutality might be expected to excite some little compas-
" sion. The plaintiff was pursued out of court by the hisses of
" several of the attending spectators. The feelings of disgust
" and indignation triumphed over the decorum of the court,
" and for the moment even 'order' was not called. It is pain-
" ful to record any thing which is so foul and brutal as to
" defile the character of human nature, but we consider the
" full-blown honours of *our hero* (meaning the plaintiff) ripe for
" publication, and to withhold such an example would be a
[496] " sin against society. Though it clearly appeared *from the testi-*
" *mony of every person that was in the room* where the arbitration
" was held, *except* Mr. Stiles, that no violence was used by
" *A. B.*, yet, reader, hear with horror! a violent assault was
" sworn against him by Mr. *Stiles*, and a bill of course found
" by the grand jury; (thereby meaning and insinuating that
" the plaintiff had been guilty of perjury in swearing before
" the said grand jury that an assault had been committed upon
" him, the plaintiff, by *A. B.*, and that a bill of indictment
" was found by the said grand jury against *A. B.* by means of
" the

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"the perjury of the plaintiff.) When *A. B.*'s trial came on "no witness appeared against him; and though Mr. *Stiles* in "his exculpatory address to the jury expressly mentioned and "urged with marked force the fact of a bill having been found "against *A. B.* for a violent assault upon him; yet Mr. *Stiles*'s "professional associate said, that it was not his (*Stiles*'s) inten- "tion to proceed against *A. B.*" (Here followed the irrevelant matter, as if stated by *A. B.*'s counsel tending to ridicule the plaintiff: concluding that) "the counsel for the prosecution "stated that an assault committed under circumstances of "great provocation should be considered by the jury, and that "the infirmities of human nature were not to be confounded "with the gross and senseless ferocity of a brute. The coun- "sel with great humanity seemed willing to acknowledge "Mr. *Stiles*'s insanity; but the jury, having their attention "directed probably to some other than the lunatic asylum, "instantly pronounced him (the plaintiff) guilty, to the great "satisfaction of a crowded court. The *Billingsgate* language "that was used we have omitted, unwilling to stain our columns "with such pollution. Besides, it could be no novelty "to a great majority of our numerous readers who have [497] "themselves often heard the accomplished and erudite "Mr. *Stiles* with astonishment, if not delight or admiration." The second count was for printing and publishing the same libel. And there were two other counts stating the libel generally.

Pleas. 1. The general issue. 2. A justification as to the printing and publishing the several supposed libels; for that at the general quarter sessions in and for the borough of—— next before the publishing, &c. to wit, on, &c. a prosecution was brought forward against the plaintiff for an assault upon the said *A. B.*, and that the said assault was stated by the counsel for *A. B.* to have been a savage, unprovoked, and brutal attack upon *A. B.*; and that in the opening the case it was stated, and afterwards clearly and fully established by evidence, that the plaintiff did wantonly and savagely attack *A. B.* at an arbitration. And it appeared that the plaintiff at the said arbitration, in disputing professionally as an attorney, had recourse to blows, which were administered with no ordinary violence or treachery. That *A. B.* being inferior in personal strength

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strength to the plaintiff urged him to desist, and at the same time made such declarations as in the supposed libels are in that behalf set forth. That in the course of the trial of the plaintiff for the said assault one *C. D.* was produced as a witness on behalf of the plaintiff; and that *C. D.* then and there proved that the plaintiff had been repeatedly called and always considered a coward, and that he had heard *E. F.* make mention of his cowardice; and that such words and conversation as are in the supposed libels in this behalf mentioned did thereupon take place between the plaintiff and *E. F.* And that the plaintiff did almost on the instant of being pronounced guilty by the
498] jury go out of court, and was pursued by the hisses of several of the attending spectators, who were not for the moment called to order by the Court. And that *though it clearly appeared by the testimony of every person in the room* where the arbitration was held, *except the plaintiff*, that no violence was used by *A. B.* nevertheless it appeared that a violent assault had been sworn against *A. B.* by the plaintiff, and that a bill of indictment had been found by the grand jury upon the evidence of the plaintiff at the preceding sessions for an assault upon the plaintiff. That when the trial of *A. B.* came on, no witness appeared against him: and although the plaintiff in his exculpatory address to the jury expressly mentioned and urged the fact of a bill having been found against *A. B.* for a violent assault upon him, the plaintiff, yet the counsel of the plaintiff, in the supposed libel called his professional associate, said it was not the intention of the plaintiff to proceed against *A. B.* (Here followed the rest of the statement of the counsel omitted in setting forth the libel.) And that *E. F.* in the supposed libels mentioned as counsel for the prosecution did then and there make such statement and observations as are in the supposed libels in that behalf mentioned. That the jury who tried the plaintiff did pronounce him guilty of the assault upon *A. B.* in manner, &c. mentioned. *And that the supposed libels do contain a just and faithful account of the trial of the plaintiff for the said assault, and of the proceedings thereupon:* Wherefore the defendant did print and publish them, as he lawfully might, for the cause aforesaid. 3dly, As to the printing and publishing *such parts of the said several supposed libels as purport to contain an account or statement of the trial* of the plaintiff at the borough sessions, &c. aforesaid, for

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for an assault upon *A. B.*; *of the trial of A. B.* at the same sessions for an assault upon the plaintiff; and of the * facts, circumstances, and statements which occurred and were made respectively upon the said trials, the defendant justified; because before the printing and publishing, &c. viz. on, &c. at * [499] the general quarter sessions, &c. the plaintiff was tried and found guilty upon a certain indictment then depending in the said court, of an assault upon *A. B.*; and *A. B.* was tried and acquitted upon a certain indictment therein also depending against him for an assault upon the plaintiff; and *that the said parts* of the said several supposed libels *in the introductory part of this plea mentioned* contain a just and faithful account of the said last mentioned trials, and of the facts, circumstances, and statements which respectively occurred, took place, and were made thereupon: wherefore the defendant printed and published the *said parts*, &c. as he lawfully might for the cause aforesaid, &c. And 4thly, as to the printing and publishing *such parts* of the supposed libels *as relate to the finding of a bill* by the grand jury against *A. B.* for an assault upon the plaintiff *upon the oath of the plaintiff;* the defendant justified, for that before the printing and publishing, &c. to wit, on, &c. at, &c. the plaintiff was tried at the general quarter sessions, &c. upon an indictment therein depending against him for an assault upon *A. B.* at a certain arbitration, &c. And although at such trial it clearly *appeared from the testimony of every person that was in the room where the arbitration was held, except the plaintiff*, that no violence was used by *A. B.*; yet true it is that a violent assault had been sworn against *A. B.* by the plaintiff before a grand jury at the preceding quarter sessions, &c.; and that a bill of indictment had been in consequence thereof found by the said grand jury against *A. B.* for an assault upon the plaintiff, as in the supposed libel is mentioned. Wherefore, &c. [500]

The replication joined issue on the 1st plea, and demurred to the other pleas: stating for special causes of demurrer to the 3d plea, that it does not appear by the introduction to that plea what it means to justify: that if it go to the printing and publishing of the whole of the libels mentioned in the declaration, the plea is altogether bad and defective: and that if it only go to part of the libels, it is not expressed with sufficient certainty what parts the defendant means to justify: and that it

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it is impossible to separate the several parts of the libel in manner and form as is attempted to be done by that plea: and that it is impossible to take any precise or certain issue thereon. And for special causes of demurrer to the 4th plea, that it does not express with any degree of certainty the parts of the libels which the defendant means to justify; and that it is impossible to separate the several parts of the libels in manner and form as attempted by that plea; and impossible to take any precise or certain issue thereon, &c. Joinders in demurrrer.

Js. Clarke in support of the demurrers. This justification cannot be supported within the principle of the cases which legalize true reports of judicial proceedings; (*a*) for here extraneous matter is introduced, and the whole account is coloured by the passions and malice of the writer. The first count charges a libel to have been written of the plaintiff in his character of clerk of the Court of Requests, &c.; and yet the
[501] justification contains nothing touching that character: it imputes no judicial delinquency to the plaintiff, but merely states an account of an assault by one individual upon another: there could therefore be no ground for the writer of the pretended report to introduce the plaintiff in that character; and consequently, the justification, not answering that part of the charge, is bad. It is also alleged that the libel was written in order to cause it to be suspected and believed that the plaintiff was guilty of perjury; the only justification of which is, that "it *appeared* by the testimony of every person in the room, &c. (not stating to whom it appeared) that a violent assault had been sworn," &c. The writer states his own conclusion from the facts, instead of stating what the witnesses swore, and leaving the reader to draw his conclusion; though even if he had stated the whole of what had been sworn, it would at most only have amounted to a case of contradictory testimony, and would not have justified him in imputing perjury to the plaintiff: and it is no justification even to shew that one was found perjured by a verdict unless followed up by judgment: (*b*) but here there was no verdict even to justify the defendant. The whole statement is highly wrought up and coloured by the defendant, and

(*a*) Vide *Rex* v. *Wright*, 8 *Term Rep.* 293. and the cases there cited.
(*b*) *Jacobs* v. *Songate*, 1 *Brownl.* 11. 2 *Brownl.* 122.

shews

shews upon the very face of it that it was not intended as a fair and impartial account of a judicial proceeding, but must be considered as a composition of his own. It is intituled "*Judicial Delinquency*," and is prefaced by general observations on that head, in which as well as in subsequent parts the writer uses the word *we*, as speaking in his own person to the public. In one place he describes the plaintiff as *our hero*: and throughout the account of what is stated to have passed in court is mixed up with matters of description and observation of the writer, which from the nature of them could form no part of a judicial proceeding. As to the ground of special demurrer to the two last pleas, he argued that no issue could be taken upon those pleas; for as to the third, it professed to be a justification of parts only of the libel, without setting forth what parts: and it is not enough to refer generally "to such parts as purport to contain an account of the trial," &c.; because if the defendant meant to justify parts only, he should have stated those parts in his plea, and cannot throw upon the plaintiff the burden of selecting them, which he cannot do with certainty. And the same observations apply to the 4th plea. The Court then desired to hear

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Scarlett contrà. Upon the whole of the pleadings there is no uncertainty. For, first, the plea of the general issue goes to the whole libel, and so does the first justification; and the other justifications apply to particular parts. The first justification states what did actually pass in court on the trials: and if, according to the doctrine laid down in the case of *Astley* v. *Young*, (*a*) and in *Rex* v. *Wright*, (*b*) and in other cases there cited, it is no libel to publish a true representation of proceedings in courts of justice, the Court upon comparing the facts stated in the first justification, which stand admitted by the demurrer, with the alleged libel set forth in the declaration, will be able to decide whether the justification cover the whole. But at any rate, the other justifications, being confined to such parts of the libels as the Court shall in their judgment determine to relate to the judicial proceedings therein referred to, will be good for so much: and the defence of the rest of the libel will stand upon the general issue. It is sufficient that the

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(*a*) 2 *Burr.* 807. (*b*) 8 *Term Rep.* 293.

defendant

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defendant justifies all the *facts* alleged in the libel: and as to the application of them to the plaintiff in a judicial or any other character, it is immaterial, provided the publication of such facts, as occur in a judicial proceeding, be justifiable. But *Judicial Delinquency* does not necessarily mean misconduct in the character of a Judge, which character is not filled by the plaintiff, but was merely stated to call the attention of the public to the situation which the plaintiff held as clerk of the Court of Requests. Whether or not the defendant meant to publish a true and fair account of the proceedings in a court of justice, or only intended that as a vehicle for conveying malicious and libellous insinuations against the plaintiff by mixing them with the other, is properly a question for the jury, and might have been tried upon the common replication that he published the libel of his own wrong, and without the cause by him alleged. [Lord *Ellenborough* and *Grose* J. here observed, that it must not be taken for granted that the publication of every matter which passes in a court of justice, however truly represented, is, under all circumstances, and with whatever motive published, justifiable; but that doctrine must be taken with grains of allowance. It often happens, said Lord *Ellenborough*, that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry are very distressing to the feelings of individuals on whom they reflect: and if such circumstances were afterwards wantonly published, I should hesitate to say that such unnecessary publication was not libellous, merely because the matter had been given in evidence in a court of justice.] That would be a question for the jury, whether such a selection

[504] had been made and published with a malicious intent, and not with a view to give a bonâ fide representation of the proceedings of the Court. But it was expressly ruled in *Curry* v. *Walter*, (*a*) that the publishing a true account of the proceedings of a court of justice, however injurious to the character of an individual, is not libellous. [Lord *Ellenborough* C. J. The case of *Curry* v. *Walter* only shews that a fair, plain, unvarnished account of proceedings in a court of justice is not a libel; but not that a highly coloured picture, mixed up with insinuations of perjury, is not a libel. What do you say to the objection that you have not answered the insinuation of perjury?] The

(*a*) 1 *Bos. & Pull.* 525.

libel

libel does not profess to state the fact that no violence was used to the plaintiff by *A. B.;* but only to represent what passed on the trials. 1806. STILES *against* NOKES.

[Lord *Ellenborough* C. J. Though the fact be not in terms denied, yet the whole turn of expression is to insinuate that the plaintiff swore falsely; for which you offer no adequate justification. It might have *appeared by the testimony of every witness in the room* that no violence was offered by *A. B.:* and yet the plaintiff might not be guilty of perjury in what he swore. *Grose* J. You affect to justify an imputation of perjury, and do not. *Lawrence* J. The facts stated are consistent with the plaintiff's not having committed perjury, but are no justification of the charge insinuated in the libel that he did commit perjury. If the publication had only stated a fair account of the proceedings in court without any comments, the argument might have been well founded: but the writer has introduced his own comments, in which he directly insinuates the commission of perjury by the plaintiff. *Le Blanc* J. The defendant can only justify by facts and allegations, which, if true, will necessarily acquit him of having falsely inferred the commission of perjury by the plaintiff. In an indictment for perjury the prosecutor does not content himself with stating certain facts, from whence it is to be inferred that what the defendant had before sworn was false, but he goes on to say, *and so* the defendant committed perjury, &c.; which is a direct allegation of the offence. So in a justification of a libel imputing perjury, it is no answer to shew that ten persons swore one way, and that one person swore the contrary way, without some allegation of the falsity of the fact sworn to by the latter.] [505]

Scarlett then attempted to support the two last special pleas by saying, that if the Court upon the first special justification saw sufficient ground to sever such parts of the libel as contained an account of the trials from the rest, which was only the comment of the writer, the uncertainty objected to by the plaintiff's counsel as an argument against these pleas was at an end. And according to *Dallison*, 33. where a plea refers to a thing which shews the certainty, it need not be particularly alleged: as if it refer to any matter which appears by the record. And no difficulty could have arisen from taking issue and going to trial on these pleas, because the Judge who presided would instruct

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instruct the jury as to those parts of the libel which were justified, and those which were not; and they would be told to consider the facts justified as true, but to consider also what use had been made of those facts in the extraneous matter added, and which was not justified; which would lessen the damages so much. When called upon, however, by the Court to separate the parts of the libel which he meant to justify, he did not
[506] succeed in the attempt throughout to the satisfaction of the Court. On which

Lord ELLENBOROUGH C. J. said, the account of the proceedings in court is so interwoven with the comments that we cannot with certainty separate them throughout, although we can see plainly enough that certain parts are an overcharged account of the judicial proceedings. The Court cannot decompose this mass: but the party who requires the separation to be made for his own defence ought to have taken upon himself the burden of doing it, in order that the Court might see with certainty what parts he meant to justify. I should have great difficulty in saying what parts purport to contain an account of the trial, and what parts are libellous. If they cannot be separated by the industry of the pleader, how can they be so by general reference. If they can be so separated, they ought to have been.

GROSE J. of the same opinion.

LAWRENCE J. A general reference to former parts of the record may be sufficient in pleading, without repeating the whole of such parts, where it is a reference to something certain: but the reference here is to parts, which so far from being certain cannot even now be distinctly pointed out. The title at the beginning professes to be the account of the whole trial; but there are parts which manifestly could have no place in a judicial proceeding. Then ought the difficulty of making the separation, which cannot now be satisfactorily solved, to be thrown upon the Court and jury at Nisi Prius?

[507] LE BLANC. A plea of justification may be good with a general reference to certain parts of the libel set forth in the declaration, if the Court can see with certainty what parts are referred to; as if the reference be to so much of the libel as imputes to the plaintiff such a crime, (e. g. perjury) that would be sufficient without repeating all those parts again, which would lead

lead to prolixity of pleading, and ought to be avoided. But here the reference is to nothing which can with certainty be pointed out.

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The defendant's counsel then prayed leave to amend, which was denied per totam Curiam; the Lord Chief Justice saying, that the Court would not assist a person who, under pretence of publishing the proceedings of courts of justice, published only libels which he could not afterwards justify.

Judgment for the Plaintiff on the Demurrer.

Sir HENRY STRACHEY Bart. and GILES *against* TURLEY, BURT, and Others.

Friday, June 13th.

THIS was an action of debt, in which the Plaintiffs declared that the Defendants were indebted to them in 13*l.* 2*s.* 6*d.* by virtue of the stat. 28 *Geo.* 3. *c.* 52. intitled * An act for the further regulation of the trials of controverted elections or returns of members to serve in parliament; to which the defendants pleaded nil debent. There was a similar action by the same plaintiffs for the like sum against *Frost*, with the like plea; and a third similar action by the plaintiffs against *Frost* and *Turley*, and the other defendants named in the first action for 679*l.* 19*s.* 10*d.*, with the like plea. These actions were tried before Lord *Ellenborough* C. J. at the sittings at *Westminster* after *Michaelmas* term 1805, when a verdict was given for the plaintiffs in each cause for the respective sums therein demanded, subject to the opinion of this Court on the following case.

Where two several petitions, signed by different persons, were presented to the House of Commons against the return of members to serve in parliament for *East Grinstead*, which petitions were referred to the same select committee for trial, who reported them both to be frivolous and vexatious, the costs cannot be taxed *jointly* under the stat. 28 *Geo.* 3. *c.* 52.; and therefore the Speaker having first certified a joint taxation of costs for a certain sum against all the petitioners, and having afterwards by an amended certificate apportioned how much of the first mentioned sum taxed was incurred by the sitting members in opposing the two petitions *jointly*, and how much was so incurred by them in opposing each *separately*, the plaintiffs, by the advice of the Court, submitted to enter nonsuits as well in two several actions prosecuted against the respective petitioners for the separate costs certified against each, as also in a joint action against all to recover the taxation certified against them all *jointly*.

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At the last general election Sir *Henry Strachey*, Mr. *Giles*, and Mr. *Frost*, were candidates for the borough of *East Grinstead* in *Sussex*, and the two former were returned duly elected. On the 29th of *November* 1802 a petition was presented to the House of Commons signed *by Mr. Frost alone*, and not by any of the other defendants; complaining of that election and return; which petition stated, that at the last election for the borough of *East Grinstead* &c. on the 7th of *July* last, the petitioner, Sir *H. Strachey*, and Mr. *Giles*, were candidates to represent the same in parliament. That the right of voting is in the inhabitants paying scot and lot, and the freeholders of the borough. That *G. B.* the bailiff acted as returning officer for the town and borough aforesaid with gross partiality, &c. That a considerable shew of hands appeared in favour of the petitioner; yet that *G. B.* declared the shew of hands to have been in favour of Sir *H. S.* and Mr. *Giles;* and on a poll being demanded, &c. and taken before the said bailiff, *a majority of legal votes was polled for, or tendered,* in favour of the petitioner, [509] over the said Sir *H. S.* and Mr. *G.*, and the petitioner was duly elected and ought to have been returned one of the burgesses, &c.; but that the bailiff admitted several illegal votes in favour of Sir *H. S.* and Mr. *G.*, and rejected many legal votes tendered in favour of the petitioner; and returned Sir *H. S.* and Mr. *G.* as duly elected, &c. And after alleging corrupt practices against the sitting members, it concluded with praying that the House would take the premises into consideration, and grant him relief, &c. And Mr. *Frost* entered into a recognizance to the king in 200*l.* with two sureties in 100*l.* each, to appear before the House of Commons at the time fixed by the House for taking his petition into consideration; and also to appear before any select committee appointed for the trial of the same, &c. The House of Commons ordered this petition to be taken into consideration upon the 8th of *February*. On the 1st of *December* 1802 a petition was presented to the House, signed by *J. Bart*, *J. Turley*, and the other defendants in the first action, and several others, stating in like manner the constitution of the borough and right of voting therein, and alleging partiality, &c. in the returning officer; and that *he permitted many persons to vote who had no right, and rejected the votes of the petitioners and others who were duly qualified to vote*, &c.; and

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and praying relief in the premises. And *J. Burt* (one of the defendants) entered into such recognizance for the trial of the same petition as is by law required, in 200*l.*, with two sureties in 100*l.* each. Mr. *Frost* did not sign this petition. The House of Commons ordered this petition to be taken into consideration *at the same time with the petition of Mr. Frost:* and the select committee was duly ballotted and appointed on the 17th of *March* 1803 for trying and determining the merits of *both* petitions. On the 4th of *April* 1803 the chairman of the committee reported to the House that the said committee had determined, that Sir *H. S.* Bart. and *D. Giles* Esq. were duly elected burgesses to serve for the said borough; and that the petition of Mr. *Frost*, and the other petition of *J. Turley*, *J. Burt*, &c. were frivolous and vexatious. These determinations were entered on the journals of the House, and an examined copy of such entry was produced in evidence. On the 15th of *June* 1804 the speaker signed the following certificate, which was produced in evidence: "Whereas *N. Smith* Esq. one of the Masters of the High Court of Chancery, and *J. H. Ley* Esq. Clerk Assistant of the House of Commons, who were duly authorised and directed by me according to the stat. 28 *Geo.* 3. intitled, &c. to examine and tax the costs and expences of Sir *H. S.* Bart. and *D. Giles*, Esq. incurred by them in opposing the petition of *J. Frost* Esq. and also in opposing the petition of several persons in behalf of themselves and others, electors of *East Grinstead*, &c. presented to the House of Commons, complaining of an undue election and return of them the said Sir *H. S.* Bart. and *D. Giles* Esq. as burgesses, &c. have reported to me the amount of such costs and expences: Now I do hereby certify that the said costs and expences allowed in the said report amount to 706*l.* 3*s.* 10*d.*" (Dated) 15th of *June* 1804, (and signed) *Cha. Abbott*, Speaker. A copy of this certificate was served upon the defendant *Frost*, and payment of the costs therein certified to be due was demanded of and refused by him. On the 7th of *May* 1805 the plaintiffs made a further application to the Speaker to ascertain how much of the costs and expences allowed in the certificate amounting to 706*l.* 3*s.* 10*d.* was incurred by the plaintiffs in opposing the said two petitions as there were *jointly* prosecuted; and how much thereof was incurred by them in opposing each of the said petitions *separately* prosecuted; who thereupon granted the following

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following certificate, which was produced in evidence.—"Whereas *N. Smith* Esq. one of the Masters, &c. and *J. H. Ley* Esq. Assistant, &c. who were duly authorised and directed by me, according to the stat. 28 *G.* 3. intitled, &c. to examine and ascertain how much of the costs and expences allowed by them in their report to me, dated the 12th of *June* last, was incurred by Sir *H. S.* Bt. and *D. G.* Esq. or either of them, in opposing the petition of *J. Frost* Esq. and also the petition of several persons whose names were thereunto subscribed on behalf of themselves and others the electors of the borough of *East Grinstead*, &c. severally complaining of an undue election and return of them the said Sir *H. S.* and *D. G.* for the said borough of *East Grinstead*, as the said two petitions were *jointly* prosecuted; and how much thereof was incurred by them, or either of them in opposing each of the said two petitions as separately prosecuted; have made their report to me thereupon: Now I do hereby certify conformably to the said last mentioned report that the costs and expences incurred by the said Sir *H. S.* and *D. G.* in opposing the petition of *J. F. separately* prosecuted amount to 13*l.* 2*s.*: and in opposing the petition of the several electors of the borough of *East Grinstead* aforesaid *separately* prosecuted amount to 13*l.* 2*s.*; and that the expences of the said Sir *H. S.* and *D. G.* in opposing the said two petitions *jointly* prosecuted amount to 679*l.* 19*s.* 10*d.*; which said three last mentioned sums make up the sum of 706*l.* 3*s.* 10*d.* as allowed in the said former report made to me on the 12th of *June* last, and certified by me on the 15th of *June* last accordingly." (Dated) 13th of *June* 1805, (signed) *Cha. Abbott*, Speaker. Payment of these several costs were respectively demanded of and refused by the defendants. Whereupon these three actions were brought; one against *Turley* and others, the defendants in the first action, for 13*l.* 2*s.*; in which action *Frost* is not a defendant; one against *Frost* alone for 13*l.* 2*s.*; and the third against *Frost*, *Turley*, and others, for 679*l.* 19*s.* 10*d.* The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover in all or any of the said actions? if in all, then the verdict to stand: if not in all, but only in two, or one, the verdict to stand in such two or one: if not entitled to recover in all or any, nonsuits to be entered accordingly.

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Wood for the plaintiffs contended, that they were entitled to recover in all the actions. The objections made at the trial were, that as there were two *separate* petitions by *different* petitioners there could not be *joint* costs awarded against all: and that the Speaker having once made his certificate was functus officio, and could not make any subsequent certificate amending the one first made. The stat. 10 *Geo.* 3. *c.* 16. *s.* 1. provides that whenever a petition complaining of an undue election and return shall be presented to the House of Commons a day and hour shall be appointed for taking the same into consideration: and by *s.* 13. a select committee of thirteen members with two nominees shall be sworn to try the matter of the petition referred to them, and *to try and determine the merits of the return;* and the House shall order the committee to meet for that purpose at a certain time to be fixed; whose determination by *s.* 18. shall be final. It appears from thence that the whole merits of the election are to be tried by *one* committee only. [513] Then by stat. 11 *Geo.* 3. *c.* 42. *s.* 1. if several parties on *distinct interests or grounds of complaint* shall present *separate* petitions, the same notices and orders shall be given to all such parties, &c. as by the last mentioned act are directed to be given to the sitting members or the petitioners therein mentioned, &c. And by *s.* 6. if on complaint of an undue election there shall be more than two parties on distinct interests, each party shall strike off a member from the original number of 49 successively, until the number shall be reduced to 13. Thus the formation of the committee is made a joint concern. Lastly, the stat. 28 *Geo.* 3. *c.* 52. reciting the two former statutes and another of the 25 *Geo.* 3. *c.* 84., and that it was expedient that further regulations should be made for the execution of those acts, and provision made for discouraging persons from presenting frivolous or vexatious petitions, &c. in any of the cases to which the recited acts relate, enacts (*s.* 19.) "That wherever any "such committee shall report to the House with respect to any "such *petition*, that the same appeared to them to be frivolous "or vexatious, the party or parties, if any, who shall have ap- "peared before the committee in opposition to such *petition*, "shall be entitled to recover from the person or persons *or any* "*of them*, who shall have signed such *petition*, the full costs and "expences which such party or parties shall have incurred in "opposing

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"opposing *the same:* such costs and expences to be ascertained "in the manner hereinafter directed." There are corresponding directions for other cases in the 20th and 21st sections. And then by *s.* 22. it is enacted, "That in the several cases "before mentioned the costs and expences of proseeuting or "opposing *any such petition* * shall be thus ascertained; that on *[514] "application to the Speaker by any petitioner or petitioners, &c. "for ascertaining such costs and expences he shall direct the "same to be taxed by two persons, &c. who are thereby re- "quired to examine the same and to report the amount thereof "to the Speaker, who shall on application deliver to the party "or parties *a certificate* signed by himself, expressing the amount "of the costs and expences allowed in such report, &c. which "costs if not paid may by *s.* 23. be recovered by action of "debt." And by *s.* 24. "in every case where the amount of "*such costs and expences* shall have been so recovered from any "person or persons, it shall and may be lawful for such person "or persons to recover in like manner from the other persons "or any of them, if such there shall be, who shall be liable to "the payment of the *said costs and expences a proportionable* "*share* thereof, according to the number of persons so liable." Here the same select committee having been appointed and sworn to try both petitions, according to the directions of the acts, as involving the merits of the same return, the two became *one joint consolidated petition*, to be determined by one and the same trial. He also referred to the usage of parliament as in favour of this construction; and instanced similar taxations to the present made in the cases of *Bodmin* election in 1791, of *Cricklade* in 1794, and of *Colchester* in 1796. And in answer to an objection thrown out by the Court that the word *petition* was used in the *singular* number throughout the several clauses referred to regulating the taxation of costs, which according to his construction ought to have been *petitions;* he referred to *Schuldam* v. *Bunnis and another*, (*a*) where a *joint* action was [515] maintained against two bailiffs of a borough for refusing the inspection of books, though the stat. 3 *Geo.* 3. *c.* 15., which gives the remedy, mentions *bailiff*, &c. in the singular number.

(*a*) *Coup.* 192.

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The Court said that might be so in a case where the sense of the thing manifestly required it. But here they said that a certain power was given by statute, which they could not enlarge beyond the plain letter of it, and that power was confined in terms to tax the costs of *such petition* in the singular number throughout: and the 24th section evidently referred to an apportionment between joint petitioners in the same petition. And a contrary construction they thought would work injustice: for it might happen that one person or set of persons might petition against a return on the ground of a single fact in dispute, as that the sitting member was under age, or the like; and another set of petitioners might impeach the election upon the allegation of the bribery and corruption of a majority of the voters; which would make the greatest differences in the costs and expences of those who opposed them: but it would be too much to contend that both sets of petitioners were equally and jointly liable to the whole costs and expences of the defence; and yet both would be interested in disqualifying the sitting member. The similarity of interest therefore was no reason for subjecting different sets of petitioners on different grounds to a joint taxation, any more than the reference of the several petitions to the same committee for trial; which was directed for the sake of general convenience; the issue being the same, namely the validity of the return: but that did not prevent the interests of the respective petitioners being severed afterwards. And such being the opinion of the Court on the original joint taxation, they suggested to the plaintiffs' counsel, whether it might not be more for the interests of his clients to [516] enter a nonsuit in all the actions, since a recovery in the two upon the separate taxation might be set up as a bar to any other action which might hereafter be brought upon a new certificate.

The case stood over for some days to give the plaintiffs time for consideration, and finally they agreed to enter nonsuits in all the actions.

Clifford was to have argued for the defendants.

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Friday, June 13th.

The Earl of CLANRICARDE *against* STOKES.

Assuming it to be necessary in an action for a penalty by a common informer that the count should refer to the statute *giving the remedy* as well as to that *creating the offence and giving the penalty*; yet a count for a penalty on the stat. 5 *Ann.* c. 14. stating that the defendant kept a snare to kill game *against the form of the statute* in such case made, &c. by reason whereof, *and by force of the statute* in such case made, &c. an action hath accrued &c. is sufficient; for the first statute mentioned refers to the 5 *Ann.* c. 14. creating the offence and giving the penalty; and the statute lastly mentioned refers to the 2 *G.* 3. *c.* 19. whereby the *whole* penalty is given to the common informer, the half only of which had been given to him by an intervening statute.

IN debt to recover the penalty of 5*l.* created by the stat. 5 *Ann. c.* 14. the declaration stated that the Defendant within six months next before the exhibiting of the Plaintiff's bill, to wit, on the 4th of *Nov.* 1805. at *Exton* in *Hampshire*, did keep a snare to kill and destroy game, the said snare being then and there an engine to kill and destroy the game, against the form of the statute in such case made and provided; the said defendant not being in anywise qualified or having any lawful authority so to do: by reason whereof, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of the defendant 5*l.* Plea nil debet.

After verdict for the plaintiff, it was moved in last *Easter* term to arrest the judgment, and the rule was now supported by

* *Jekyll* and *Dampier*, on the ground that the penalty and the remedy by action were given by several different statutes viz. the penalty by stat. 5 *Ann. c.* 14., (*a*) made perpetual by stat. 9 *Ann. c.* 25. (which so far may be considered for this purpose as one act;) and the remedy by three statutes, first by the stat. 8 *Geo.* 1. c. 19. substituting the action (which is to be brought before the end of the next term after the offence,) for the information before justices under the stat. 5 *Ann.*, and giving half the penalty to the common informer; next, by the stat. 26 *Geo.* 2. *c.* 2. which extends the time for bringing the action to two terms after the offence committed; and lastly, by the stat. 2 *Geo.* 3. *c.* 19. which gives the whole penalty (sought to be recovered in this action) to the informer, and extends the time for bringing the action to six months after the offence committed, but without repealing the statute of the 26 *Geo.* 2. *c.* 2.: the offence therefore, they contended, ought to have

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(*a*) This gave the remedy by conviction before a justice of peace.

been

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been laid against the statutes, in the plural, and not, as it is here laid, "against the form of the statute." And this objection it was said, was not aided by the conclusion of the count, "by reason *whereof* and by force of the *statute*, &c. an action hath accrued;" for either *the statute* there mentioned must mean the same statute referred to in the former part of the count, or at any rate it can only refer to one of the three statutes last-mentioned; whereas the right of suing for the whole penalty by a common informer must depend upon two at least, the 8 *Geo.* 1. and 2 *Geo.* 3., if not also upon the 26 *Geo.* 2. And the case of *Lee* v. *Clarke*, (*a*) was cited, where the same objection (amongst others) was taken and countenanced by the Court; [518] and in which *Dingley* v. *Moore*, (*b*) and *Broughton* v. *Moore*, (*c*) were cited, which are full to the present point, as well as what was said by *Warburton* J. in *Rex* v. *West.* (*d*) And they contended that where an offence was created by a statute inflicting a penalty, which did not exist at common law, and an action is afterwards given to a common informer, it is as necessary that the Court should be referred to the statute or statutes giving the remedy, as to the statute creating the offence: for otherwise, if instead of a general reference to "the statute in such case made," the count referred to the statute 5 *Ann.*, the Court would not see that a right to sue had *thereby* accrued to the plaintiff: and the Court cannot without such reference intend that an action is given to a common informer; for primâ facie the penalty would belong to the Crown.

Burrough and *Gaselee* shewed cause, and argued that, as the statute 5 *Ann.* c. 14. alone creates the offence and gives the penalty, the offence is properly laid to be against the form of the statute, according to the authorities mentioned; to which may be added *Plowden* 206.; and that, notwithstanding a continuing, or as is said by *Warburton* J. in *Owen* 355. even a reviving statute; though here the stat. 9 *Ann.* c. 25. which perpetuates the former act, passed before it expired. (*e*) And it makes no difference that the action is given by another statute. It was not necessary for the count to refer at all to the statute which gives the remedy to the common informer; for, being a public statute, the Court are bound to notice it; and it being

(*a*) 2 *East*, 333. (*b*) *Cro. Eliz.* 750. (*c*) *Cro. Jac.* 142.
(*d*) *Owen*, 135. (*e*) Vide 2 *Hawk.* c. 25. s. 117.

stated

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stated that the action was brought within six months, and the penalty being given to him who sues, the bringing the action shews a sufficient title in the plaintiff. It is only necessary to refer to the statute creating the offence and giving the penalty: all the rest may be rejected as surplusage: and the count might have concluded that "by reason whereof, (without adding "and by force of the statute.") an action hath accrued," &c. *Lutw.* 132. 3. 8. 164. 166. 190. 3. 208. 221. *Lill. Entr.* 148. 175. 222. 255. *Co. Entr.* 159. 161, 2, 3, 4, and 5. But the addition of contrà formam statuti, though not necessary, will not hurt, according to *Bennett* v. *Talbois*. (*a*) But supposing it to be necessary to refer to the statute giving the action, such reference is to be found in the words of the count, "and by force of the statute," &c.; referring to the stat. 2 *Geo.* 3. *c.* 19. *s.* 5. which must be construed reddendo singula singulis, and gives an action of debt or on the case, &c. and enables the informer to sue for the whole penalty to his own use within six months. It would then stand thus, that the allegation of the offence being committed against the form of the statute would refer to the stat. 5 *Ann. c.* 14. which creates the offence and gives the penalty; and the subsequent words, "by reason *whereof*," would refer to the same statute; and the words, "and by force of *the statutes*, &c. an action hath accrued," &c. would refer to the statute 2 *Geo.* 3. *c.* 19. The case of *Lee* v. *Clarke* did not turn on this point. [*Lawrence* J. It was not alleged there that he *used* the snare *against the form of the statute.*] And this is distinguishable from *Dingley* v. *Moor*, (*b*) where the information was upon the statute 33 *Hen.* 8. *c.* 16. for buying worsted yarn within the county of *Norfolk*, not being a
[520] weaver, &c.; which act was continued by stat. 1 *Ed.* 6. *c.* 6. only in respect of yarn *spun of the rock*, but not for other yarn; and therefore the information was quashed, not because it was only laid contrà formam statuti, but because it did not shew that it was *yarn spun of the rock*; for otherwise it was no offence. And *Shelton*'s case for recusancy, there relied on, where the objection prevailed that it was not laid contrà formam statutorum, was where the offence was created by the stat. 1 *Eliz. c.* 2. and the penalty given by stat. 23 *Eliz.* c. 1. against

(*a*) 1 *Ld. Ray.* 149. (*b*) *Cro. Eliz.* 770.

such

such as refused to go to church against the form of the stat. 1 *Eliz.* And *Broughton* v. *Moore* (*a*) went on the same distinction.

It was asked by Lord *Ellenborough* of the defendant's counsel in the course of the argument, whether they had found any express authority for saying that the count must refer to the statute giving the remedy, as well as to that creating the offence and giving the penalty? To which they answered in the negative; but contended that it was equally necessary upon principle for the reasons before urged. And at the conclusion.

The Court, assuming it to be necessary to borrow the aid of two statutes in order to sustain the action, viz. the stat. of 5 *Ann. c.* 14. creating the offence and giving the penalty, (on which statute alone the criminal part of the charge rested;) and the stat. 2 *Geo.* 3. *c.* 19. giving the remedy; (which latter, they thought, alone gave the remedy, without reference either to the stat 8 *Geo.* 1. or the stat. 26 *Geo.* 2., inasmuch as it gave the whole penalty to the informer, and not merely the other half in addition to the one half before given by the stat. 8 *Geo.* 1.) yet observed, that here there was a sufficient reference in the count to the two first-mentioned statutes: and that if, instead of the general form of declaring by reference to "the statute in such case made," &c. the particular statute were referred to by name, the count would run thus, that the defendant committed the offence (stating it) against the form of the statute 5 *Ann.* &c.; by reason whereof, and by force of the stat. 2 *Geo.* 3. an action hath accrued, &c. There was therefore no ground for the objection in arrest of judgment.

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Rule discharged.

(*a*) *Cro. Jac.* 142.

The

Monday, June 6th.

The KING *against* The Marquis of STAFFORD and Others.

One having an only child *Rebecca*, who was married and had three children, *Thomas*, *Rebecca*, and *Ann* devised his copyholds to *Rebecca* his daughter for life, remainder to his grand-daughter *Rebecca* for life, remainder to trustees to preserve contingent remainders, remainder to the use of the *issue of the body* of his grand-daughter *Rebecca*, in such parts, shares, and proportions, *manner and form*, as she should by deed or will appoint; and in default of appointment to the use of all and every the *children* of his said grand-daughter and *their heirs*, as tenants in common: and *in default of such issue*, to the use of all and every the other children of his daughter *Rebecca* and their heirs, as tenants in common, &c.; and in default of such issue to his own right heirs: held that upon the death of the testator's daughter and of his grand-daughter *Rebecca*, without any appointment, an only child of the latter took an absolute fee; on whose death, under age and unmarried, the premises descended to her uncle *Thomas* as her heir at law; and that the subsequent limitation to the other children of the testator's daughter *Rebecca* did not take effect: for the devise to the *children* of his grand-daughter *Rebecca* and *their heirs* prima facie carries a fee; and the subsequent words "in default of *such issue*," refer to *her children* and not to *their heirs*; though the limitation over *in default of such issue* be made to those who might take as heirs to the children of *Rebecca* the grand-daughter. And the intention of the devisor that her children, if any, should take *a fee* is further evinced by this, that the limitation to them and their heirs is in default of appointment under a power given to her to appoint "to the use of the issue of her body in such *manner and form* (as well as in such *parts, shares, and proportions*) as she should direct;" under which words *manner and form* she might have appointed to all or any of her children *in fee*, and was not restrained to appoint to them *in tail only*; which limitation, in default of appointment, is a substitution for the execution of the power.

ON a motion for a mandamus to the lords and stewards of the manor of *Chertsey Bemond*, in the county of *Surrey*, to admit *Thomas Hoade* to the entirety of certain copyholds holden of the said manor, it was by the permission of the Court, and with the consent of *John Acton* * (the person interested in resisting the rule,) agreed that the facts might be stated in the form of a special case for the opinion of the Court; and that the issuing of a peremptory writ of mandamus should depend upon their opinion, whether the said *Thomas Hoade* were entitled to the entirety of such premises, or only to an undivided moiety of them, as tenant in common in tail with the said *John Acton*. The facts agreed on were these. On the 2d of *February* 1780, *William Goring*, being seised of the premises in question, and having surrendered them to the use of his will, and having an only child, *Rebecca*, the wife of *John Hoade*, by his last will, duly executed, devised the same as follows: "I give and de-

vise

vise unto my daughter, *Rebecca Hoade*, all that my messuage, with the appurtenances, situate and being in *Chertsey*, on the east side of a street there called *Windsor Street*, and now in the occupation of *J. Cobb*, and also my copyhold lands in *Chertsey* aforesaid, called *Dubles-Brooks*, to hold to her and her assigns during her natural life; and from and after her decease I give and devise the said messuage and lands unto my grand-daughter, *Rebecca Hoade*, and her assigns, during her natural life; and from and after the determination of that estate, I give and devise the said messuage and lands unto *F. H.* and *J. H.* and their heirs, during the life of my said grand-daughter, *Rebecca Hoade*, upon trust to preserve the contingent remainders hereinafter limited, &c.; and from and after the determination of that estate, to the use and behoof of the lawful *issue of the body* of the said *Rebecca Hoade*, *in such parts, shares, and proportions, manner and form*, as the said *Rebecca Hoade*, my grand-daughter, whether sole or married, shall by her last will and testament in writing, attested by three or more credible witnesses, or by any deed or writing purporting to be her last will and testament, to be executed in the presence of the like number of witnesses, direct, will, limit, or appoint the same: and in default of such direction, &c. or appointment, "To the use and behoof of all "and every the *children* of my said grand-daughter, *Rebecca* "*Hoade*, lawfully to be begotten, and *their heirs*, as tenants in "common, and not as joint tenants: and, *in default of such* "*issue*, to the use and behoof of all and every the other children "of my said daughter, *Rebecca*, by the said *John Hoade*, "begotten or to be begotten, and their heirs, as tenants in com- "mon, and not as joint tenants: and in default of such issue, "to the use of my own right heirs for ever." The testator died in 1780, leaving the said *Rebecca Hoade*, his daughter, and also the said *Rebecca Hoade*, the grand-daughter and devisee, and two other grandchildren, viz. *Thomas Hoade*, the prosecutor of the mandamus, and *Ann Hoade*, (who afterwards intermarried with *Samuel Acton*, who is since dead, leaving the said *John Acton*, her only son,) the brother and sister of the said *Rebecca Hoade*, the grand-daughter. Mrs. *Hoade*, the daughter, held the premises in question from the testator's decease till her death in 1790, when her daughter, *Rebecca*, took possession. The last named *Rebecca* married *Benjamin Bailey*, who died in 1796,

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1796, and she herself died in 1797, without having made any effectual direction or appointment of such premises; *leaving an only child, Mary Ann Bailey,* who by her guardian received the rents, but was never admitted, and died an infant, and without issue on the 15th *February* 1802. The prosecutor is her maternal heir at law. *Ann Acton* survived her sister, *Rebecca Bailey,* and died in the lifetime of *Mary Ann Bailey;* leaving the above *John Acton,* her only son; who on the 24th *January* 1804 was admitted (by his guardian) to an undivided moiety of the said copyhold premises.

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This case was argued on a former day in this term by *Maryatt,* on the part of the prosecutor, *Thomas Hoade,* who claimed as heir at law of the infant, *Mary Ann Bailey,* in whom he contended that the absolute fee vested under the limitation, in default of appointment, to the *children* of the testator's granddaughter, *Rebecca Hoade, and their heirs,* &c.; and by Sir *V. Gibbs,* on the parts of the defendants nominally, but in effect on the part of *John Acton,* who claimed as tenant in common in tail of an undivided moiety with *Thomas Hoade,* under the subsequent limitation, "in default of such issue, to the "use of all and every the other children of the testator's "daughter, *Rebecca,*" &c. The Court, in giving Judgment on this day, having noticed the principal arguments and authorities referred to at the bar, it is unnecessary to repeat them.

Lord ELLENBOROUGH C. J. In this, as in all other cases respecting the construction of wills, our object must be to discover what was the intent of the testator, as it is to be collected from the words he has made use of; and it has been properly said, that such construction must be put on the words "*in default of such issue,*" on which the present question arises, as will best effectuate the intention of the testator; which Sir *V. Gibbs* has contended clearly to be that the estate in question should go over to *Thomas Hoade* and *Ann Acton,* "the other children of his daughter, *Rebecca,*" if his grand-daughter *Rebecca Bailey*'s children should die before they arrived at an age to dispose of it. And this, he says, will be effected by giving *Rebecca Bailey*'s children an estate tail, with a remainder to the children of *Rebecca Hoade,* her mother. And upon this argument the question arises, whether there be words in the will to shew such intent?

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intent? Now there can be no doubt but that the words, according to the common and ordinary legal use of them, most distinctly give a fee. For the devise is in these terms, "To "the use and behoof of all and every the children of my grand-"daughter, *Rebecca Hoade*, and their heirs; and, in default of "such issue, to the use of all and every the other children of "my said daughter, *Rebecca*;" without any thing being expressly said as to time of the failure of such issue: And it is but *by inference* from the limitation over being *in default of issue*, that it is contended, that the testator meant his other grand-children should take, *if the children of his grand-daughter* Rebecca, *should die during their minority*. Had the testator been told that if he gave the children of his grand-daughter, *Rebecca*, a fee, and they should die during their minorities that his estate would go to the eldest son of his daughter, *Rebecca*, to the exclusion of her other children, it is not improbable but he might have said, that is not my intent. But there is nothing in this will to enable us certainly to say, whether such event were or were not in his contemplation. If it were, may it not be fairly concluded, by his not expressly providing for it, that he thought the event not likely to happen, and on that account not worth his while to provide against: or supposing him not to have contemplated it at all, why might not his intention be to give his grand-daughter's children a fee, if she had any; and if she had none, that in such event the other children of his daughter should take the estate? Thus it would stand if the devise to the children of his grand-daughter, *Rebecca*, were an immediate devise; but that is not the case; for the devise to them is in [526] default of the execution of a power of appointment given to the mother, enabling her to appoint the estate "to the use and be-"hoof of the lawful issue of her body, in such parts, shares and "proportions, manner and form," as she should by will or deed direct. This, in the course of the argument, was said, but not much pressed, to be only *a power to appoint to her children in tail*; and if that were so, it would furnish an inference that the limitations which were to take place in default of appointment were intended to be *of the same nature*. But we think that this devise gave a power to appoint *in fee*: for admitting that there might be ground to contend that the power was only to appoint in tail, if the power of appointment had only been "to the use of "her

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"her lawful issue in such parts, shares, and proportions, as she "should direct;" upon which it is not to be understood that we give any opinion; yet when the words, "*manner and form*," are added, there can be no doubt but that in order to give them some effect, (and every word, if it can, ought to be made operative,) something more must be understood than merely a power of unequal division of an estate to be limited in a certain course of descent: and if they do mean any thing beyond a power of division, they must import a power of determining the nature and quantity of the estate the issue should take: and if so, the mother might appoint estates in fee to all or any of her children, which, if they died in their minorities, might go to their uncle, *Thomas Hoade*, as their heir at law, in exclusion of their aunt, *Ann Acton*. And as, under this power, the issue of *Rebecca Bailey* might, according to what must be taken to be the intention of the testator, have had estates in fee given them,

[527] how can we say that by a limitation, which was meant as a substitution for the execution of the power, the testator did not intend to give as large an estate in all respects as could be appointed under the power? and it is most natural and rational to conclude that he so intended. The whole argument in this case has rested in applying the words, "in default *of such issue*," to the *children* of *Rebecca Bailey*, *and their issue*: but this construction did not prevail in *Goodright* v. *Dunham*, *Doug.* 264. nor in *Doe* v. *Perryn*, 3 *Term Rep.* 484.; though the authority of *Ives* v. *Legg*, relied on in this case, was pressed on the attention of the Court in that. In the latter of the two cases above mentioned, viz. *Doe* v. *Perryn*, Mr. Justice *Buller* laid it down that *children* and *issue* were synonimous; and both he and Lord *Kenyon* distinguished *Legg* v. *Ives* from *Doe* v. *Perryn* by reason of the limitation over in that case being *in default of issue*, which was properly referrable to the word *children*, and not to *heirs*: but in *Ives* v. *Legg*, the limitation over was, "*in default thereof*," which might well be referred to the word *heirs*. In the case of *Goodright* v. *Dunham*, the limitation over was, "*if he die without issue*," which was referred to *children*: and it has been said, that this distinguishes that case from this, where the words are, "*and in default of such issue*:" but this is a distinction without a difference: for the one expression as well as the other might, under the same circumstances, mean an indefinite failure of issue;

issue; and if so, why may not the one have the same construction with the other under different circumstances equally attending both. In commenting upon these cases, various observations were made on different parts of the wills in those cases, which had weight in determining their construction; such as the *Leasing Power* in *Doe* v. *Perryn*, * and the addition of the words *for ever* after the word *heirs;* which circumstances are not to be found in the case before us. It is true that those circumstances are wanting; but they are not circumstances on which any very material reliance can be placed: and there exists in this case (if such further circumstance be wanting) another which has more weight, (which has indeed been observed upon already;) namely, a power of appointment in the mother, enabling her to give a fee, for which the limitation in question is only a substitution. As to the case of *Lewis ex dem. Ormond* v. *Waters*, lately determined in this court, (6 *East Rep.* 336.) where the words, "*for want of such issue*," were referred to the word *heirs*, that was not determined on the ground of those words being in their ordinary and proper sense referrable to the word *heirs;* but on this, that it was clear the testator meant that the first and other sons of his eldest son should take estates in succession in remainder; which they could only do by taking estates tail: and if so, the words "*for want of such issue*" were properly used to denote the determination of such estates, in order to introduce other limitations dependant upon them. For these reasons we are of opinion, that a peremptory mandamus should go, to admit *Thomas Hoade*, the heir at law of the deceased only child of the grand-daughter *Rebecca Bailey*, to the estate in question.

* [528]

Rule absolute.

HORN

1806.

Tuesday, June 17th.

HORN, Executrix of HORN, *against* HORN and Another.

The annuity act 17 *Geo.* 3. *c.* 26., as appears from the whole purview of it, is confined throughout to annuities granted upon *pecuniary* consideration, though the first clause, in the terms of it, requires a memorial of *every* annuity bond, &c. to be enrolled: it is not enough, therefore, for the defendant to plead generally to an action on a bond conditioned for the payment of an annuity, the consideration whereof does not appear upon the face of the bond or condition set forth upon oyer, that it was sealed and delivered *after* the passing of the act and that *no memorial* of it was enrolled; without shewing that the consideration was *pecuniary*; but such general plea is bad on demurrer.

TO debt on two bonds, one for the penal sum of 3630*l.*, the other for the penal sum of 5000*l.*, the Defendants, after craving oyer of the first bond and of the condition, by which it appeared to be a bond conditioned for the payment to the testator, &c. of 1815*l.* on the 1st of *Sept.* 1801, with lawful interest from the 1st of *March* preceding; and after craving oyer of the second bond and of the condition, by which it appeared to be a bond conditioned for the payment to the testator, his executors, &c. during the lives of him and his wife (the Plaintiff) and the survivor, an annuity of 600*l.*; pleaded non est factum to both bonds. There then followed several pleas alleging that the two bonds, and each of them, were given on the several usurious considerations therein set forth; one of which (whereby the nature of the transaction will appear) stated, that before the making of the same writing obligatory, viz. on the 24th of *February* 1801, *John Horn*, (the testator,) and one *Robert Horn*, and *Wm. Horn*, (one of the defendants,) were copartners, as distillers. That on the 1st of *March* 1801, before the bonds given, *Robert Horn* ceased to be a partner; and on the 20th of *March* 1801 the testator was desirous of withdrawing himself from the partnership, in order that the same business might be carried on by the defendants together upon certain terms to be agreed upon. And that on the said 20th of *March*, before the bonds given, it was corruptly agreed between the testator and the defendants, that the testator should withdraw from the said business as from the 1st of * *March*, preceding in favour of the defendants, and permit them to occupy and enjoy a certain distill house and other premises, and certain utensils of trade therein, in consideration of an annuity of 600*l.* to be paid to the testator, his executors, &c. during the lives of himself and his wife, and the survivor of them; and that the defendants should take the debts owing to the late partnership; and that the horses, drays, &c. (*Robert Horn* having consented thereto) of the late partnership

should

should be purchased by the defendants for 1815*l.*; which sum the testator should lend to the defendants, and should forbear and give day of payment for the same to them from the said 20th of *March* 1801 until the 1st of *September* 1801, for which they should pay him interest at the rate of 5*l.* per cent. as from the 1st of *March* 1801 to the said 1st of *September;* although the said 1815*l.* were not lent till after the said 1st of *March*, &c.; and although 900*l.*, part of the said debts, were not received by the defendants till long after, &c. And then it alleged that the first bond for 3630*l.* and the other bond for 5000*l.* conditioned to secure the said annuity of 600*l.* were given in consideration of and to secure the said usurious agreement. And lastly, (as to the annuity bond,) the defendants pleaded that the said writing obligatory, with the condition thereof, was sealed and delivered *after the passing of the stat.* 17 *Geo.* 3. *c.* 26. (the annuity act,) viz. on the 20th of *March* 1801, and that *no memorial* of the same was within 20 days of the execution thereof *inrolled* in the Court of Chancery as required by the act, by reason whereof the said writing obligatory is null and void. The replication took issues on the usurious agreements alleged in the former pleas, and demurred generally to the last plea.

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HORN *against* HORN.

Burrough, in support of the demurrer relied upon the cases [531] of *Crespigny* v. *Wittenoom*, (*a*) and *Hutton* v. *Lewis*, (*b*) as shewing that the 8th clause of the annuity act, which says that it shall not extend "to any voluntary annuity granted without regard to *pecuniary* consideration," was not merely an exception to the generality of the first clause, requiring a memorial of *every* annuity to be inrolled; but that the first clause itself, construed and explained as it was by the preamble, and by the 3d, 4th, 7th, and 8th clauses, applied only to annuities granted upon *pecuniary* considerations, and not to all annuities: and therefore, as the consideration did not appear upon the face of the bond or of the condition, set forth upon over, it was necessary for the defendants to shew in pleading that the consideration was *pecuniary;* without which the want of a memorial, objected to in the last plea, was no bar to the action. In *Praed* v. *The*

(*a*) 4 *Term Rep.* 799. (*b*) 5 *Term Rep.* 639.

Duchess

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HORN against HORN.

Duchess of Cumberland, (*a*) where there was a similar plea, it appeared upon oyer of the condition that the consideration of the annuity bond was pecuniary. Then, according to the rule of pleading in the third resolution of *Whelpdale*'s case, (*b*) where a bond or other writing is avoided by act of parliament, the party who would avoid it cannot plead non est factum, but must plead the special matter.

Littledale contrà, admitting that by the received construction of the annuity act taken altogether, if the consideration were not pecuniary, the case was taken out of the generality of the first clause, contended that it was not necessary for the defendants in their plea to allege that the consideration was pecuniary,

[532] but that it was sufficient for them to bring the case within the general words of the first clause of the act, which extends to every bond given to secure an annuity; and it lay upon the other side to shew in reply that the consideration was such as that the statute did not attach upon it. As it is said in *Plowd.* 376. that where the body of an act is general, he who would bring his case within an exception must plead it specially.

Lord ELLENBOROUGH C. J. That is the case where the body of an act is general, and an exception to that generality is afterwards introduced by way of proviso or exception: but here the body of the act is not general; but, as Lord *Kenyon* observed in *Crespigny* v. *Wittenoom*, it is to be gathered from the whole purview of the act that it was only meant to apply to annuities granted upon pecuniary considerations: and the last section is introduced only ex abundanti cautelâ, and not by way of proviso or exception to the general enactment. The whole range of the act shews this. It is not necessary to stand upon the first clause alone; though even on the construction of that clause I think it may be so confined; but the meaning of the Legislature appears still clearer as you advance to the second clause, and the perusal of the third leaves no doubt; and when you come to the 8th clause it is matter of surprise how the construction could ever have been doubted.

Per Curiam, Judgment for the Plaintiff on the demurrer.

(*a*) 4 *Term Rep.* 585. and 2 *H. Blac.* 230. (*b*) 5 *Rep.* 119.

STILL

1806.

STILL *against* WALLS and HARRIS.

Tuesday, Jan. 17th.

IN an action for an assault and false imprisonment, to which the Defendant pleaded the general issue, it appeared in evidence for the Plaintiff before *Heath* J. at the last *Maidstone* assizes, that the defendant *Walls*, as headborough of *Cowdend* in the county of *Kent*, and *Harris* as his assistant, arrested the plaintiff some day in *January* 1805, between 3 and 4 o'clock in the afternoon, and detained him in their custody till the evening of the next day, when they carried him before Mr. *Allnutt*, a justice of peace for that county, who then discharged him. A demand of the copy of the warrant by which the plaintiff had been apprehended was then proved by his attorney, but no copy was given. On the other hand Mr. *Allnutt* the magistrate deposed, that an information was laid before him by one *Bellenden* against the Plaintiff for killing game on a *Sunday*, against the stat. 13 *Geo.* 3. *c.* 80. *s.* 6., (*a*) founded on the prior stat.

The stat. 13 *G.* 3. *c.* 80. gives a penalty in case of killing game on a *Sunday*, and directs that it shall be forthwith paid on conviction; and that in case of neglect or refusal to pay or give security for the payment of it the justice shall *by warrant* under his hand and seal cause the same to be levied by distress and sale of the offender's goods; and that it shall be lawful for such justice *to order* such offender to *be detained in custody* until return may conveniently be made to such warrant of distress, unless the party convicted shall give security for his appearance, &c. Held that such *order to detain in custody* until the return of the warrant of distress may be *by parol*.

(*a*) The act of the 10 *Geo.* 3. directs that "in case such penalty shall not "be forthwith paid such justice shall by warrant under his hand and "seal cause the same to be levied by distress and sale of the offender's "goods, &c. And in case no sufficient distress can be had, such justice shall "commit the offender to the common goal," &c. But that act is repealed by the 13 *Geo.* 3. *c.* 80. *s.* 5. in all its provisions. But by *s.* 6. of the latter statute, any person killing game on a *Sunday*, "being convicted thereof in "the manner and form prescribed by this act, shall be subjected to the "like forfeitures and penalties as are hereinbefore enacted to be inflicted "for other offences against this act." The 1st section relates only to so much of the statute 10 *Geo.* 3. as provides against destroying game in the night, for which it inflicts certain penalties on conviction for a first, second, and third offence. *Sect.* 2. gives a form of conviction; *s.* 3. directs the clerk of the peace to give a copy of the conviction; and *s.* 4. enacts That the pecuniary penalties [&c.] to be recovered and made payable upon

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stat. 10 *Geo.* 3. *c.* 19. *s.* 2. (which information was read in evidence.) That he accordingly summoned the plaintiff, who appeared before him, and convicted him of the penalty specified in the act; which the plaintiff declaring himself unable to pay, the magistrate issued a warrant of distress returnable the next day, and *verbally* directed the defendants to detain the plaintiff in custody until it could be known whether a sufficient distress could be levied on the plaintiff's goods. The plaintiff however paid the penalty the next day, and was then discharged. It was objected that the magistrate was not authorised by the statute to commit the plaintiff *by parol:* if he were so authorised, a nonsuit was to be entered; otherwise a verdict for 40*s.* given by the jury was to stand.

Garrow and *Espinasse* now shewed cause against a rule for entering a nonsuit, and referred to the rule laid down by *Hawkins*, (*a*) that every commitment must be *in writing*, under the hand and seal of the person by whom it is made, and ex-
[535] pressing his office or authority, and the time and place at which it is made, and must be directed to the goaler or keeper of the prison. And contended that the *order* of the justices, spoken of in the stat. 13 *Geo.* 3. *c.* 80. *s.* 4, to detain the offender in custody till the return of the warrant of distress, must be understood of an order of commitment in the usual legal form, namely, an order *in writing*, &c. That this was confirmed by the general provisions of the stat. 24 *Geo.* 2. *c.* 44. whereby no action shall be brought against any constable or other officer acting in obedience to a justice's warrant until demand and refusal for six days of the perusal, and of a copy of the warrant; the pro-

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" any conviction, &c. shall be *forthwith* paid by the person convicted, &c. " And in case such person shall refuse or neglect to pay the same, or to " give security for the payment thereof, such justice shall by warrant under " his hand and seal cause the same to be levied by distress and sale of the " offender's goods," &c. And then it proceeds, " and *it shall and may be* " *lawful for such justice to order such offender to be detained in safe custody until* " *return may conveniently be had and made to such warrant of distress*, unless " the party so convicted shall give sufficient security for his appearance, &c. " But if upon such return no sufficient distress can be had, then and in such " case the said justice shall and may commit such offender," &c.

(*a*) 2 *Hawk. ch.* 16. *s.* 4.

duction

duction of which warrant is a justification to the officer: the object of which regulation is to give some certain remedy against the magistrate himself, who is thereby made responsible for the legality of the arrest. But if a commitment by parol may be justified, great mischief and uncertainty will be introduced, and the checks intended by the legislature in favour of the liberty of the subject will be eluded. They also suggested that the proper course would have been for the magistrate to have made out his warrant in the alternative; i. e. to distrain for the penalty, if a sufficient distress could be found; or otherwise, to commit the party.

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Bayley Serjt. and *Taddy* were to have supported the rule; but

The Court were all satisfied that under the act of the 13 *Geo.* 3. *c.* 80. the magistrate might legally authorise by parol the defendants to detain the plaintiff in custody till the return of the warrant of distress. They also said, that the commitments spoken of by *Hawkins* in the passage cited meant commitments [536] to the custody of sheriffs, goalers, &c. For it never could be doubted but that a magistrate might by parol order an offender to be detained in custody until he could make out his warrant of commitment: and this Court were in the constant habit of directing commitments verbally, which were afterwards recorded. So a magistrate in case of a breach of the peace within his view might instantly order the offender to be taken into custody: otherwise in the case of a sudden affray, all the powers of the king's commission might be in abeyance for want of pen, ink, and paper. That there was nothing in the act requiring the authority to distrain, and to commit if there were no sufficient distress, to be by the same warrant: and the Lord Chief Justice thought that, according to the wording of the act, the authority was rather more properly executed by separate warrants.

Rule absolute for entering a nonsuit.

1806.

Tuesday, June 17th.

TOMS *against* POWELL.

Where the debt was paid after an *alias pluries* writ issued, the defendant cannot object at the trial that the latitat was not returned; for at any rate if the alias pluries writ were the commencement of the action, it is only an irregularity; which, though a ground for application to the Court to set aside the proceedings, yet having been once waived, cannot afterwards be objected to. Neither can it be objected at the trial that when the debt was paid the defendant had no notice of any action commenced or costs incurred.

ASSUMPSIT for goods sold and delivered. Plea non assumpsit. At the trial before *Heath* J. at the last *Surrey* assizes the Plaintiff's demand for the goods was admitted to the amount of 6*l.* 10*s.* 1*d.*; and the only question was, whether the Defendant had not paid for them before the action was commenced. The plaintiff sued out his first writ, dated 22d of *June* 1805, which * was not proved to have been returned; his second writ, an alias, on the 25th of *June*, and an alias pluries returnable in *Michaelmas* term, and served on the 26th of *August*. After the issuing of the last writ, and before the service of it, the defendant paid the plaintiff his full demand for the goods; but no mention whatever was made of the costs at that time: which it was now insisted ought also to have been paid. The jury found a verdict for the plaintiff with nominal damages; and the defendant had leave to move to enter a nonsuit, if the Court should be of opinon with him.

Bowen moved in *Easter* term last to enter a nonsuit, 1st, on the ground that for want of shewing the return of the writ of latitat, there was nothing whereon to found the alias pluries writ, and therefore no proper commencement of the action shewn before the debt was paid. And he referred to *Harris* q. t. v. *Woolford*, (*a*) where it was holden necessary to shew the return as well as the suing out of the first writ, in order to save the statute of limitations. 2dly, That the debt was paid by the defendant without any knowledge of an action commenced; and that the receipt of it by the plaintiff without any demand for costs was a waver of them on his part. *The Court* however granted a rule nisi on the first ground only; saying that the last ground of objection, however it might have induced the Court on application to stay the proceedings, was no defence at the trial. And now,

Lawes, on shewing cause, having observed that the debt was not paid till after the issuing of the alias pluries writ, the irregularity of which, supposing the first writ had not been re-

(a) 1 Bos. & P. 561.

turned

turned, was cured by appearance, and could not be objected to at nisi prius;

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The Court, without hearing any further argument, agreed that if the latitat were not to be considered as the commencement of the suit for want of its being returned, at any rate the subsequent process, to which the defendant had appeared, was to be so considered: and the debt not having been paid till after the suing out of that process, the plaintiff was entitled to a verdict for the recovery of his costs. They added, that the defendant should have applied to the Court in the first instance to stay the proceedings, instead of going to trial. And *Lawrence* J. observed, that this was very different from the case of *Harris* v. *Woolford*, where in order to avoid the statute of limitations it was necessary to connect the alias writ with the original writ of latitat, in order to shew that the action was commenced within time; which could not be done without shewing the return of the first writ. That case would have applied more to the present if the defendant had paid the debt after the issuing of the latitat, but before the issuing of the alias pluries writ; for then in order to have entitled himself to the costs the plaintiff must have shewn the commencement of the action before the payment of the debt by the return of the latitat. But here the debt was not paid till after the alias pluries writ issued, to which the defendant appeared. And if that were not a proper commencement of the action, the defendant should have applied to the Court to set aside the proceedings for irregularity: but having waved the irregularity, he cannot afterwards object to it.

Rule discharged. (*a*)

(*a*) See *Prosser* v. *Hole*, 7 *Term Rep.* 6, and *Price* v. *Nelson*, ante, 538.

The

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Wednesday, June 18th.

The KING *against* The Inhabitants of LEIGH.

Five days before the end of the year a servant absented himself by leave one day from his master's service to look out for another place, and on his return the master on some trivial pretence said he should not stay any longer in his service, and offered him a trifle less than his whole wages; which the servant refused; but was then ready to have accepted his whole wages, though he would rather have staid out his year; and immediately applied to a magistrate to oblige his master either to pay him the whole or to receive him into his service for the remainder of the year; when the magistrate ordered half-a-crown to be deducted, and the servant thereupon *hired himself to another master, before his first year was out*; and after the year received from his master his whole wages: Held that this was a dissolution of the contract before the end of the year by mutual consent, signified on the part of the servant by his entering into another service.

TWO justices by an order removed *John Brazier*, *Hannah* his wife, and their four children, by name, from the parish of *Leigh* to the parish of *Clifton-upon-Teame*, both in the county of *Worcester*. The sessions on appeal quashed the order, subject to the opinion of this Court on the following case.

The pauper, *John Brazier*, being legally settled in *Clifton-upon-Teame*, on the 31st of *March* 1795 hired himself as a servant in husbandry for a year to *S. Jones* of the parish of *Lulsley*, and agreed for 6*l.* 10*s.* for the year's service. The pauper resided at *Lulsley* in *Jones*'s service from thence until the 25th of *March* 1796; upon which day, by permission of his master and for the purpose of seeking a new service for the ensuing year, he went to the Mop (a meeting for the purpose of hiring servants) at *Bromyard*, six miles from *Lulsley*. The pauper did not return to his master's house till three o'clock in the morning of the 26th of *March*, when he came home with some ribbons in his hat, which he had purchased. In the course of the morning of the 26th his master came to him, and observed, "he supposed masters were scarce at the Mop, and that he had enlisted for a soldier, and told the pauper he should stop no longer in his service." The pauper told his master he had not enlisted, (which was the fact,) and that he wished to stop his year out. But the master said he would not keep the pauper any longer in his service, and the pauper should stop no longer; and at the same time offered the pauper as wages for the time he had served something less than 6*l.* 10*s.*, which the pauper refused to accept. The pauper said he would have accepted the full year's wages if then tendered to him by his master; but

that

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that he had rather have staid out his year. The pauper left his master's house immediately in consequence of what had passed, and never returned to it. On the next day, the 27th of *March*, a summons having been taken out by the pauper against his master, they both appeared before the justice of the peace for the said county; upon which occasion the pauper applied to the magistrate to direct his master either to receive him into his service for the remainder of the year, or to pay him his whole year's wages: and the magistrate verbally directed half-a-crown to be deducted from the year's wages and retained by the master. The pauper on the same 27th of *March* hired himself as a servant to Mr. *Smith* of *Broadwas*, and on that day entered upon such service. About a week after the pauper went to his former master Mr. *Jones* for his wages, who paid the full sum of 6*l.* 10*s.* Mr. *Jones* some days afterwards applied for a return of the half-crown directed by the magistrate to be deducted, but the same was never returned to Mr. *Jones*. The Sessions, being of opinion that the pauper under the circumstances above stated had gained a settlement in *Lulsley* by hiring and service for a year with *S. Jones*, quashed the order. The question for the opinion of the Court was, Whether under the circumstances above stated the pauper served a year with *S. Jones*, so as to gain a settlement in *Lulsley?*

Puller, in support of the order of Sessions, endeavoured to distinguish this from *Rex* v. *King's Pyon*, (*a*) and *Rex* v. *Sunbrook*; (*b*) in the former of which the master upon some dispute had discharged the servant so long as four months before the end of the year; and the magistrate to whom the servant applied for redress gave the master the option either to take her back or to put an end to the contract upon paying the whole year's wages; and he elected to pay the whole wages, which the servant agreed to accept; but the master withheld some wool which he had agreed to give her if she behaved well. In the case of *Sudbrook* it was stated that the servant, about a fortnight before his year expired, being too ill to work, *left his master's service* upon receiving his whole year's wages, from whence his assent to the dissolution of the contract was inferred;

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(*a*) 4 *East*, 351. (*b*) Ib. 356.

as

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as in the prior case it was from the servant's accepting the wages upon the terms offered by the magistrate to the master. In neither case was there any fraud, which is the distinguishing feature of this case. Here the servant going to seek for another place at the Mop was a lawful cause of absence, as was holden in *Rex* v. *Islip*, (*a*) for which the master could not have discharged him, even if he had gone there without leave, and still less with it: and it was settled in the case of *England* and *West-Horsley* (*b*) that a master cannot prevent his servant gaining a settlement by wrongfully turning him out of his service before the end of the year. Now here the act of the master was wrongful and fraudulent, and the servant all along refused to put an end to the contract, and received his whole year's wages after the expiration of the year.

542] *Peake* and *Petit* contrà were stopped by the Court.

Lord ELLENBOROUGH C. J. How can there be said to have been a constant refusal of the servant to put an end to the contract when he actually entered into another service before the time when his first contract would have expired? That is an insuperable difficulty. That he did not receive his wages before the year was out cannot vary the case; for he would have received them at the time, if offered. The case of *King's Pyon* is almost in terms the same as the present. The magistrate in both cases was made a sort of arbitrator between the parties, and both parties acquiesced in putting an end to the contract of master and servant.

The other Judges concurred. And *Le Blanc* J. added, that if there were any fraud in this case the magistrate must have been a party to it.

Order of Sessions quashed.

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SEDGWICK *against* ALLERTON.

Wednesday, June 18th.

UPON a rule for setting aside an interlocutory judgment for irregularity, it appeared that the declaration was delivered on the 16th of *May*, and on the 22d there was a rule to plead. On the 23d, indorsed for the 24th, a summons was taken out for time to plead, and eight days were given, which would expire on the 4th of *June;* but the Plaintiff was never served with any order for time to plead, and considering the order as abandoned he signed judgment on the 2nd of *June:* after which and *within time if the order had been drawn up and served, the defendant pleaded the statute of limitations.

Park shewed cause against the rule, and contended for the regularity of the judgment, for want of drawing up and serving the order for time to plead. And

The Court were satisfied that the order ought to have been drawn up and served; as it might otherwise open a door to mistakes and perjury as to the terms on which the order was granted. Whereupon

Abbott contrà objected, that the declaration was delivered so late in the last term, that the defendant was not bound to plead till this term, and therefore did not want the order for time to plead: and this being assented to by the Master,

The Court on this latter ground said, that the parties were remitted to their original situation as if there had been no order made for time to plead; and therefore made the

Rule absolute.

The plaintiff is not bound to notice an order for time to plead obtained by the defendant if it be not drawn up and served; but may sign judgment as for want of a plea after the time when the defendant would have been bound to plead if no such order had been made.

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Wednesday, June 18th.

THORNTON and Others, Assignees of RANGDALE, a Bankrupt, *against* HARGREAVES and Another.

Where a trader being pressed by a creditor for payment or security, one or other of which he said he would have, gave a bill of sale of certain wools and cloths in a mill, apparently the whole of his stock, and immediately left his business and home and became a bankrupt: this, inasmuch as the act done did not redeem the trader, even from any present difficulty, which is the ordinary motive for such an act when really done under the pressure of a threat, is evidence that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy; and is therefore void as against the assignees of the bankrupt.

IN trover for certain wools and woollen cloths, tried before *Rooke* J. at the last *York* assizes, the only question was, whether the Defendant had obtained the goods in question by undue preference from the bankrupt in contemplation of bankruptcy. The material witness for this purpose was *Rd. Hargreaves* the book-keeper and near relation of the defendants, called by the Plaintiffs; who proved that when *Rangdale* became a bankrupt he owed the defendants above 200*l.*: that he had before promised them payment, and had not kept his word. That *Rangdale* met the defendants at his (the witness's) house on the 24th of *October* last. *Rangdale* had then two parcels of goods at the defendants' house, the value of which were to be settled afterwards. The defendants told *Rangdale* that they expected him to have paid according to promise, to which he answered that he had not the money, but would pay 50*l.* in a week. The defendants said they would have money, or security, or the goods; that they had a right to stop the goods, and would be paid. *Rangdale* said that they need not be in a hurry; they had always a sufficient security in their hands for their money. The same witness also deposed that he did not recollect any thing said about *Rangdale*'s stopping; but that he was afraid that some of his creditors would be turbulent with him if he could not pay them as they expected; by which the witness supposed that *Rangdale* might mean in case he suffered the goods to remain in the defendant's hands. The witness then wrote out a *bill of parcels of a sale of the goods in question from *Rangdale* to the defendants; (*a*) which was not signed by *Rangdale*, nor was he asked to sign it; but the witness deposed that he wrote it

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(*a*) This was in the common form of a bill of parcels, and intitled "*October* 24th, 1805. *R.* and *W. Hargreaves*, bought of *B. Rangdale*;" and then followed eight items of goods, amounting altogether to 190*l.* 8*s.* 8*d.*

"by

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"by *Rangdale*'s consent, order, and appointment, in his room and stead." When *Rangdale* left the witness's house he said he was going to his workman's house, about two miles from his own house: he did not say how long he should stay, nor whether he should go home that night; and he gave no other reason for going than the settling about delivering two raw cloths to the defendants. He said something about *facing his creditors;* but did not give that as a motive for going away, to the best of the witness's recollection. But that if he should be obliged to start on account of his creditors, he hoped the witness and another person whom he named would bring about an assignment. Afterwards, on the same evening, *Rangdale* desired the witness to say to his uncle that he thought he should be obliged to stop on account of what he had done for the defendants; (i. e.) the sale of the goods in question to them. On his cross-examination he said, that the bill of sale was to enable the defendants to ascertain the value. That the bankrupt had previously at times said, that the defendants had always a security in their own hands. That the bankrupt set the prices to the goods, and the witness wrote them down as he fixed them. That the defendants had suffered the bankrupt to take away three pieces of Raw the day before. That he said he had plenty to pay with, and could pay 20*s.* in the pound. That the witness made the bill [546] of sale that there might be a sale, and the defendants thought it would make it more secure. On this evidence the learned Judge left it to the jury to say whether there were any fraud between the bankrupt and the defendants. That fraud would vitiate any transaction, but that where there was no fraud creditors had a right to use menaces or compulsory means to obtain payment. And he left it to them to decide whether the defendants had acted honestly and fairly in enforcing this security by bill of sale, or whether the bankrupt had acted voluntarily, and had fraudulently agreed with them to give them a preference. The jury found a verdict for the defendants; which was moved to be set aside, and a rule nisi granted in *Easter* term last; against which

Cockell Serjt. (and *Holroyd* was with him) now shewed cause. This is no more than the common case of a creditor obtaining security for his debt by due diligence and a threat of legal process

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process before the bankruptcy of his debtor, and while he yet had a disposing power over his property. It may be admitted that the defendants considered *Rangdale*'s situation as desperate at the time, which made them the more urgent for payment, or security. They had before called upon him for payment, which he had promised, but had failed to perform; and at last they declared that they *would have* money, or security, or the goods then in their hands, which they insisted on their right to stop, and that they *would be paid*. This amounted to a threat of an arrest by legal process, unless they obtained payment or security by other means. On the other hand, it appears that *Rangdale* did not voluntarily execute the bill of sale which was afterwards given; for he still endeavoured to put the defendants off by saying that they need not be in a hurry, and that they had always a sufficient security in their hands. But fearing, as it appears, that if he were sued he should bring all his creditors upon him, and be put to great inconvenience, though still insisting upon his solvency, he at last executed the bill of sale of the goods in the mill. This cannot be said to have been a *voluntary* payment made in contemplation of bankruptcy in favour of a particular creditor; the circumstances shew that he made it unwillingly, after having in vain endeavoured to evade and postpone the demand. If the defendants had sued out a writ against him under which the payment had been obtained, there could have been no doubt of its validity; but there was no necessity for that when the end was obtained by the threat of it. The question of fraud was distinctly left to the jury, and negatived by their verdict. And he referred to *Hartshorn* v. *Slodden*, (*a*) where Lord *Alvanley*, under somewhat similar circumstances, said, that "if the goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding." And there too the goods which had been given to the defendant by the trader shortly before his bankruptcy were in part payment of a bond debt not then due; and yet the sale was establish e c.

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Park and *Topping*, in support of the rule, said, that *Hartshorn* v. *Slodden*, and other cases there cited, were cases where the act

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of bankruptcy did not take place till some days after the respective securities given; whereas here at the time of the bill of sale given there was an inception *of the act of bankruptcy; for it did not appear that the bankrupt ever returned to his own home again, and he certainly never shewed himself again in his business: and this sufficiently distinguished the present from the antecedent cases, even if the goods had been obtained upon an actual threat of process pending an incipient act of bankruptcy, then immediately contemplated; which had never yet been decided. But here there was no such direct threat; only a mere demand of security; which would not make the payment by the bankrupt less voluntary when made in contemplation of bankruptcy. [In answer to an observation of *Le Blanc* J. that there was no evidence of the proportion which the goods conveyed by the bill of sale bore to the general property of the bankrupt; they answered,] that it swept away the whole.

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Lord ELLENBOROUGH C. J. The only difficulty which lies on the plaintiffs in this case is to make out that this was a *voluntary* payment on the part of the bankrupt; for that bankruptcy was contemplated by him when he made the bill of sale all the evidence strongly shews. But taking the conversation reported between the defendants and the bankrupt to be a threat of process if they did not receive payment or security for their demand, I do not see how the execution of such a threat could put the bankrupt in a worse situation than the actual transfer of the goods did; for that left him without any property, and he was immediately obliged to break up his business and leave his home. This would rather shew that he did not make the transfer by dint of the threat; for he did not redeem himself even from any present difficulty by doing the act; which is the motive for such an act when really done under the pressure of a threat. And if he got nothing by evading the threat, I should rather say that it was a voluntary act and preference on his part as to the particular creditors. Altogether it is a very suspicious case, and fit to be further inquired into and submitted to another jury.

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LAWRENCE J. If the bill of sale swept away, as it is said, the whole of the bankrupt's property, it would be difficult to say that it was not made in contemplation of bankruptcy; because

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cause it would be in itself an act of bankruptcy; and if so made in contemplation of bankruptcy, he must have intended to give a preference to the particular creditors.

The other Judges concurring,

Rule absolute on payment of costs.

Thursday, June 19th.

The King *against* The Justices of Shropshire.

The justices are bound by stat. 9 *Geo.* 1. *c.* 7. *s.* 8. to receive and adjourn an appeal made to the *next sessions* after an order of removal made, against such order, if no notice have been given to the respondent: though they should be of opinion that the order was executed in sufficient time before the sessions to have enabled the appellants to give reasonable notice of their appeal to the respondents.

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AN appeal was lodged at the next Sessions after an order of removal made, and was moved to be adjourned, on the part of the Appellants; no notice having been given to the Respondents: but the Sessions, being of opinion that there had been sufficient time for the appellants to have given such notice after the order had been executed and before the holding of the sessions, dismissed the appeal. Whereupon a rule was obtained in the last term, calling upon the Defendants to shew cause why a mandamus should not issue to them commanding them to receive and enter a continuance on the said appeal to the * next general quarter sessions, and there to hear and determine the matter of the said appeal. This rule was enlarged to the present term on the motion of the defendant's counsel. But

Clifford now moved to make the rule absolute; stating the above facts; and suggesting that the defendants, upon advice taken, were satisfied that they had no discretion to dismiss the appeal unheard, on the ground alleged, as had been once ruled in *The King* v. *The Justices of the North Riding of Yorkshire;* (*a*) the contrary having been since determined in *The King* v. *The Justices of Bucks,* (*b*) upon the construction of the stat. 9 *Geo.* 1. *c.* 7. *s.* 8., which expressly directs that "if it shall appear to the Sessions that reasonable notice was not given, *then they shall adjourn the appeal to the next quarter sessions,* and then and there finally determine the same."

Lord Ellenborough C. J. said that the opinion delivered

(*a*) 3 *Term Rep.* 150. (*b*) 3 *East,* 342.

in

in the case of *The King* v. *The Justices of Buckinghamshire* had been well considered; and the Court were satisfied that the statute was compulsory on the Sessions in these cases to receive and adjourn the appeal.

Per Curiam, Rule absolute.

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The KING *against* The Justices of SHROPSHIRE.

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DOE, on the Demise of Lord BRADFORD, *against* WATKINS and Another.

Thursday, June 19th.

THIS was an ejectment for the recovery of messuages and lands, &c. in the parish of *Middleton* in the county of *Lancaster*, upon a demise laid the 11th of *June* 1805. The action was tried before *Chambre* J. at the last assizes for that county; and the case turned upon the sufficiency of the notice to quit. The premises in question, in the possession of the Defendants, consisting of messuages or dwelling-houses, out-houses, mills, and other manufacturing buildings, meadow and pasture lands and bleaching grounds, though not much of the latter, together with all watercourses, &c. were holden under a written agreement for a lease, dated the 1st of *January* 1792, for a term of 35 years, *to commence as to the meadow ground from the 25th of* December *then last past; and as to the pasture ground* (except the field called the *Bull-hill* for haining in) *from the 25th of* March *then next; and as to the said field called the* Bull-hill, *and the housing, mills, out-housing, and other buildings, and all the residue of the said premises, from the 1st of* May *next;* at the yearly rent

Under an agreement of demise, dated in *January*, of a dwelling house and other buildings for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching grounds, watercourses, &c. for a term of 35 years, *to commence* as to the *meadow* ground from the 25th of *December* last; as to the pasture, from the 25th of *March* next, and as to the *housing*, *mills*, and all the rest of the premises, from the 1st of *May;* reserving the first half year's rent on the day of *Pentecost*, and the other half year's rent at *Martinmas*: held, that the substantial subject of demise being the house and buildings for the purpose of the manufacture, which were to be entered on the 1st of *May*, that was the substantial time of entry to which a notice to quit ought to refer, and not to the 25th of *December*, when the incoming tenant had liberty of entering on the meadow; which was merely auxiliary to the other and principal subject of demise; and consequently that a notice to quit served on the 28th of *September* (which would have been sufficient with reference even to the 25th of *March*, the day of entry on the pasture ground: the 29th of *September* being the corresponding half yearly day of holding to the 25th of *March*) to quit *at the expiration of the current year of holding*, was sufficient. Notice to quit served on one of two tenants on the premises, who held under a joint demise, is evidence that the notice reached the other who lived elsewhere.

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of 250*l.* *payable on the day of* Pentecost, and *on the feast-day of St.* Martin *the Bishop in winter*, the *first* payment thereof *to begin and be made on the feast-day of* Pentecost *next*. It was further agreed that the original lessee * from whom the defendants claimed should within ten years after the commencement of the term lay out 4000*l.* in buildings and improvements on the demised premises. And the lessee was at liberty to get coals under the premises, paying a certain proportional rent for the same to the landlord. The notice to quit, which was served on the defendants *on the 28th of* September 1804, was for the defendants to quit *at the expiration of the then current year of their holding*. It also appeared that the defendants were partners in the bleaching trade which they carried on upon the premises. Objection was taken to the notice to quit, that it was not half a year before the 25th of *December*, nor, (according to the number of days,) before the 25th of *March;* and that the tenancy being entire, the notice to quit being bad as to part of the demised premises was bad as to all. But the learned Judge, on the authority of the cases after-mentioned, thought it sufficient; considering that the effective commencement of the tenancy was on the 1st of *May*, when the entry was to be made on the houses and the rest of the premises, besides the meadow and pasture ground, which the tenant had liberty to enter upon before. In *Easter* term last a rule nisi was obtained for setting aside the verdict and having a new trial, upon two grounds 1st, that the substantial time of entry, (which according to *Doe* d. *Strickland* v. *Spence* (*a*) is alone to be regarded) was either the 25th of *December*, from whence the first holding as to the meadow ground was to commence: or from *Martinmas* preceding; the rent being reserved at *Pentecost* and *Martinmas*, and the first half

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year being payable at *Pentecost* next after the date of the agreement; with neither of which periods (*Christmas* or *Martinmas*) did the notice to quit accord. 2dly, That notice to quit was only served on the defendant *Watkins*, who resided on the premises; there being no proof that the other defendant, who was joint tenant with and partner of *Watkins*, and resided at *Liverpool*, had been served with any such notice. But on the authority of *Jones* d. *Griffiths* v. *Marsh*, (*b*) it having been left to the

(*a*) *Ante*, 120. (*b*) 4 *Term Rep.* 464.

jury

jury to say whether the notice served on the one upon the premises had not reached the other defendant, this objection was afterwards abandoned.

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Cockell Serjt., *Topping*, and *Yates* were now to have shewn cause; but after the former had stated the facts, and the rule laid down in *Doe* v. *Spence*, and contended that the substantial time of entry was either on the 25th of *March* when the incoming tenant entered upon the pasture ground, or on the 1st of *May* when he took possession of the house and manufacturing buildings, &c., which were the principal objects of the demise; the Court desired to hear the other side; saying, that the onus was thrown upon them of shewing that the substantial commencement of the tenancy was either at *Martinmas* or *Christmas*.

Park, *Wood*, and *Scarlett*, in support of the rule, said, that in the case of *Doe* v. *Spence*, where there were different times of entry upon different parts of the premises, the Court looked to the rent-days as explanatory of the true commencement of the term; because it happened there that the time of entry on the house accorded with the next rent-day: but here, if the substantial time of entry be taken only from the 1st of *May*, the tenant whose first half year's rent was made payable at *Pentecost* would have to pay it yearly six months beforehand, without the enjoyment of that which it was said was the principal subject of the demise, and in respect of which enjoyment the rent is reserved. And the same objection applies, though in a less degree to the 25th of *March*, as the commencement of the tenancy, even supposing that a notice to quit any time before the 29th of *September* the corresponding half year's day, without going further back than the 25th of *September*, would suffice for a half year's notice to quit on the 25th of *March*; (which all the Court were clearly satisfied that it would.) [*Le Blanc* J. having observed, that in truth there was little or no enjoyment of the pasture or meadow between the 25th of *December* and the 1st of *May*: they answered] that they might be used as bleaching grounds during that period; which distinguished this case in another respect from *Doe* v. *Spence*, where the demise was merely for agricultural purposes. Here the occupation of the meadow ground on the 25th of *December* was as beneficial to the tenant for manufacturing pur-

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poses as that of the house on the 1st of *May*: therefore the notice to quit should have been half a year before the first entry, which would necessarily have been sufficient for the subsequent times of entry on the several other parts of the premises; though as the tenancy was entire no ejectment could have been brought till after the 1st of *May*, the last period of quitting. [*Le Blanc* J. said, that there was no evidence that the meadow was to be used for bleaching.] They then noticed another distinction between this and the cases of *Doe* v. *Snowden*, (*a*) and *Doe* v. *Spence*; that here there was an express stipulation in the agreement that the term of 35 years should "*commence* as to the meadow ground from the 25th of *December*," &c. which precluded all argument *by implication* that it was *to commence* at any other time as to that part of the premises; and so of the rest: whereas in the other cases, the only express stipulation was as to the times of *entry* on the several parcels, which left it open to implication and construction as to the true commencement of the term demised.

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Lord ELLENBOROUGH C. J. The rule was laid down by the Court in *Doe* v. *Spence*, that in these cases where the incoming tenant enters upon different parts of the demised premises at different times, the giving half a year's notice to quit before the substantial time of entry is sufficient: and this is a convenient rule to adhere to. What then was the substantial time of entry in this case? The object of the demise was, as stated, for the purpose of the tenant's establishing and carrying on a certain manufactory, of which the houses, buildings, and watercourses constituted the principal part; of these, as well as of the coal-mines, the tenant was to take possession on the 1st of *May*; and every thing else in the demise was merely auxiliary to the first mentioned, which were the principal objects of it. The possession of the meadow on the 25th of *December* might be convenient to the incoming tenant to prepare it, if it should be wanted, for the purpose of using it afterwards as a bleaching ground; for there could be no beneficial enjoyment of it as meadow at that season. It is therefore to be considered as a mere liberty of entering upon a part for the purpose of preparing it for the more convenient enjoyment of the

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(*a*) 2 *Blac. Rep.* 1224.

rest

rest and principal object of the demise, the houses, mills, and watercourses. No inconvenience can arise from such a construction; and it obviates the inconvenience of giving separate notices to quit the different parts of the premises, which were clearly meant to be demised as one entire thing. Then if that, which was a by-gone day at the time when the agreement bears date, were not the substantial day of entry of the tenant, the notice to quit was in time for either of the other days of entry; for the 1st of *May*, which was the substantial time of entry on the principal subject of the demise; or even for the 25th of *March*, if that were required.

GROSE J. It is right to adhere to the rule laid down in *Doe* v. *Spence*, which is founded in good sense and convenience, that the half year's notice to quit shall be given with reference to the substantial time of entry of the tenant; and when that is must depend on what is the substantial part of the thing demised whereon the tenant enters. Now here the demised premises consisted of meadow, pasture, and manufacturing buildings, &c. on which the tenant was to enter at different times; but the substantial part of the demise was the house and manufacturing buildings, &c. on which the tenant was to enter on the 1st of *May*: that therefore was the substantial day of entry. In some cases indeed it has been said that the material time to look to is the day of payment of the rent: with those cases I do not meddle: it is sufficient to say that they do not apply to the present. And there is the less reason for taking that as the criterion in this case; for the day of *Pentecost*, on which the first half year's rent was made payable, may fall upwards of a month sooner or later; and it might so happen that the tenant, if his tenancy were determinable at that period, might be deprived of so much enjoyment of the premises demised, though he paid rent for the whole year. [557]

LAWRENCE J. The question is, if there have been a reasonable notice to quit given in this case? It was decided in *Doe* v. *Spence* that half a year's notice to quit with reference to the original time of entry on the substantial part of the premises demised was sufficient, though other parts, the previous occupation of which were only auxiliary to the principal subject of demise, were to be quitted at less than half a year's notice, with reference to the original times of entry on such auxiliary parts.

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Now here the substantial parts of the demise were the house and manufacturing buildings, &c. which were entered on the 1st of *May*; and the other parts of the premises, which the tenant had liberty to enter before, were only auxiliary to these.

LE BLANC J. The substantial time of entry is not necessarily to be collected from the rent-days, though it happened in the case of *Doe* v. *Spence* that the tenant entered on the substantial part of the premises on the day from which the rent was reckoned. But here the rent is reserved on a day on which no part of the premises were entered by the tenant. In this case the principal parts of the subject demised were the house and buildings which were demised for the purpose of carrying on a manufacture there; and these were entered on the 1st of *May:* and therefore the giving six months' notice to quit with relation to that which was the substantial time of entry is sufficient, without reference to the times of entry on the other parts which
[558] were merely auxiliary to those. There was no evidence that the meadow which was entered on the 25th of *December* was to be used as a bleaching ground; and it is certain that it could not be so used in the first instance by the incoming tenant, before he had entered upon the house and other buildings where the manufacture was to be carried on.

Rule discharged.

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HINDE *against* WHITEHOUSE and GALAN.

Friday, June 20th.

Sugars, which were in the king's warehouse under the locks of the king and the owner, from whence they could not be removed till the duties were paid, were advertised for sale by auction on the 20th of *September*; when *samples*

IN assumpsit the Plaintiff declared, that on the 20th of *September* 1805, at *Liverpool*, he was lawfully possessed of 300 hhds. of sugar, then lying in a certain warehouse there, and caused them to be put up for sale by public auction upon the following conditions; "the highest* bidder to be the purchaser, and in case of dispute the lot to be put up again. The sugars to be taken with all faults and defects *as they now are, at the king's weights and tares, with the allowance of draft or re-weighed giving up the draft. To be at the purchaser's risk from the time of sale;* and to be positively removed within two months, or rent to be paid for any longer time they may remain. Payment to be made on delivery of invoices by approved

of half a pound weight from each hogshead, drawn *after* the sugars had been weighed and the duties ascertained at the king's beam, were produced to the bidders assembled; and the auctioneer, (having then before him the *printed catalogue* of sale, containing the lots, marks, and number of hhds., and the gross weights of the sugars; and also another written paper containing the *conditions of sale*, which latter he *read* to the bidders, as the conditions on which the sugars mentioned in the *catalogue* were to be sold; *but the two papers were neither externally annexed nor contained any internal reference to each other*,) wrote down on the *catalogue* the name of the highest bidder, and the sum bid for the particular lots; having first informed the bidders that the duties were not then paid, but would be paid on the morrow by the seller: and after the biddings closed, *the samples were delivered to and accepted by the purchaser*, according to the usual practice at such sales, *as part of his purchase, to make up the quantity* marked as weighed at the king's beam: and a fire having consumed the sugars on the 22d of *September*, before the duties could be paid, and *without the default of the seller*: Held,

1st, That at common law there was a sale to change the property at the time and place of auction; though the goods could not be delivered till the duties were paid, which was known at the time; such being the manifest intent of the contracting parties: and consequently that the loss must fall upon the buyer.

2dly, That assuming a sale of goods by auction to be within the 17th section of the statute of frauds, 29 *Car.* 2. *c.* 3. (which, whether it were or not was not now necessary to be decided,) and therefore requiring to be evidenced by a memorandum in writing of the bargain signed by the party to be charged, or his authorised agent, except where the buyer shall receive part of the goods sold; yet here the delivery to and acceptance of the *samples* by the buyer; which delivery was made as part of the thing purchased, and upon which the duties were paid, at any rate took the case out of the statute.

3dly, It seems that taking sales of goods by auction to be within the 17th section, the [illegible] who is a middle man, must be taken to be the agent of both parties, so as to bind the purchaser by his signature.

[illegible]

1806.

HINDE *against* WHITE-HOUSE.

bills on *London* to the satisfaction of the seller not exceeding three months date. Not to advance less than 3*d.* per cwt. at each bidding." Of which conditions the Defendants had notice. That the defendants were the highest bidders at such sale for two lots of the said sugars, consisting of 27 hhds., and became purchasers of the same at the price of 74*s.* per cwt. at the king's weights and tares, with the allowance of draft. That the price of the 27 hhds. amounted to 1265*l.* 11*s.* 3*d.* That the plaintiff on the 23d of *September* delivered to the defendants an invoice of the 27 hhds., whereupon they became liable to pay him the 1265*l.* 11*s.* 3*d.* But that the defendants did not make payment, &c. There were other counts laying the contract more generally. To all which the defendants pleaded the general issue. The cause was tried before *Rooke* J. at the last assizes at *Lancaster;* and the point in dispute was, whether the plaintiff or defendants should bear the loss of the sugars in question, which were knocked down to the defendants, by the auctioneer, at the sale on the 20th of *September,* and which were burned on the 22d of *September* by an accidental fire in one of the king's warehouses at *Liverpool*, where they were deposited. It was proved that the sugars, after being landed at *Liverpool* on the plaintiff's account, were deposited in one of
[560] the king's warehouses there, under the locks of the king and of the plaintiff, from whence they could not be removed until the duties were paid. Previous to the sale, samples were taken of the sugars, about half a pound weight out of each hogshead, according to custom. The printed catalogues of goods for sale was made out in this form and distributed: "To be sold by auction, at *Waterhouse* and *Sill*'s office, on *Friday* the 20th of *September* 1805, at 1 o'clock, 300 hhds. *Jamaica* sugar, just landed. For particulars apply to *Thomas Hinde*, merchant, or *Waterhouse* and *Sill*, brokers."

Lot.	Mark.	Hhds.	Gross Wt.
1.	I. A.	10	119 3 9
2.		10	121 0 7
&c.			
23.	R. H.	12	169 3 13
&c.			
27.		15	207 2 13
&c.			

At

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At the time of the sale the auctioneer's printed catalogue lay on the desk before him, and he wrote down in the same line with the lot purchased the name of the highest bidder or purchaser, and the price bid per cwt. thus:

Lot.	Mark.	Hhds.	Gross Wt.		
23	R. H.	12	169 3 13	74*s.*	*Whitehouse* and *Galan.*
27		15	207 2 13	74*s.*	*Whitehouse* and *Galan.*

The auction was holden at the time and place appointed, and was conducted by Mr. *Sill*, as auctioneer. There was no other sale on the same day. The samples were exhibited in the sale-room, and the lots in question were knocked down to the de- [561]
fendants as the highest bidders. At the commencement of the sale the auctioneer, having the catalogue, and also a written paper containing the conditions of sale, in his left hand, at the same time, read the latter paper, as the conditions on which the sale of the sugars mentioned in the catalogue was to proceed, to the company assembled, (including one of the defendants) which paper was entitled, "Conditions of sugar sale, *September* 20th, 1805;" and which paper he afterwards deposited on his desk under the catalogue, on which catalogue he wrote his minutes of the bidders' names and prices; but the two papers were not fastened together in any manner. He also made the following declaration by parol to the bidders, which, after the sale, his clerk wrote down upon the paper of conditions of sale. "N. B. These sugars, gentlemen, have been drawn in the warehouse within the last two days; as such, no allowance whatever will be made, except where an evident error is manifest. *The duties are not yet paid, but we intend paying them to-morrow morning.*" It is customary at such sales to give an option to the purchaser to take the sugars sold according to the weights taken at the king's beam, which were marked in the catalogue, or to have them re-weighed: to this option one of the conditions of sale points. But it is the constant practice for the purchaser to declare his option before he leaves the sale-room, if he wishes to have them re-weighed, in order that the seller may know how to make out the invoices; otherwise, if he then declare no option, the invoices are made out according to the weight at the king's beam. In the present case the defend-

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ants declared no option. The sugars are always weighed on landing, before they are * put into the warehouse; on which weighing the duties are ascertained; and after that the samples are drawn. The samples are always delivered to the purchaser *as a part of his purchase to make up the quantity;* and were accordingly delivered to the defendants on the same day after the sale. The invoices were made out on *Saturday* the 21st of *September,* but were not delivered to the defendants till *Monday* the 23d, after the fire happened. The duties are always included in the price of the sugars, and such duties are always paid by the vendor, and are so required to be by the stat. 41 *Geo.* 3. *c.* 44., (*a*) and till paid the sugars cannot be removed from the king's warehouse. The sale was over by a quarter past 4 o'clock on *Friday* the 20th, but from the hours of office and the distance there was not time after the sale to get the entries made, and to pay the duties. *Saturday* and *Sunday* were holidays at the custom-house; and *Monday* the 23d was kept as such, being the king's coronation day. The circumstance of *Saturday* being a holiday was not recollected at the time of the sale, when the auctioneer declared that the duties should be paid on the morrow; but the circumstance was mentioned by the defendant *Whitehouse,* to a clerk of *Waterhouse* and *Sill.* On this point the jury found that there was no neglect in the vendor as to the non-payment of the duties before the fire happened, which was in the course of *Sunday* the 22d. The auctioneer said that it often happened that purchasers sold their sugars again before the duties were paid, and before they were delivered out of the warehouse; and that after the fire the defendants gave him instructions to take care of the goods, and save what he could, *without prejudice to* the rights of the parties.

* [562]

Upon this proof it was objected that there was no legal evi-

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dence sufficient to fix the defendants with the purchase of these goods within the statute of frauds; there being no memorandum in writing of the contract signed by the parties or their authorised agent. That the auctioneer was no authorised agent of the vendees; but that supposing he were so, the whole contract must appear upon the paper signed by him with the names of the defendants, whereas the conditions of sale, which formed

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an essential part of the contract, were not so signed, nor in any ways connected, except by parol testimony, which was inoperative by the statute, with the catalogues signed. And that the delivery of the samples was diverso intuitu, and not as part of the goods contracted for. The learned Judge over-ruled the objection, but reserved the point; and a verdict was found for the plaintiff for 1110*l*. Whereupon a rule nisi was obtained in *Easter* term last, for setting aside the verdict, and granting a new trial, upon the same grounds of objection: which rule was in this term opposed by *Park*, *Topping*, and *Scarlett*, who shewed cause, and supported by Sir *V. Gibbs*, *Marshall* Serjt., *Holroyd*, and *Littledale*. The case was much argued, upon the circumstances of it; but it is sufficient to state the general points.

On the part of the plaintiff it was contended, 1st, that sales by auction are not within the statute of frauds (*a*) at all, because from the publicity of such transactions there is no danger of perjury in the fabrication of pretended contracts, which it was the object of the statute to guard against in private transactions, such alone being open to that danger. For which they [564] cited the opinion thrown out in *Simon* v. *Metivier* or *Motivos*. (*b*) 2dly, That if such sales were within the statute, yet that the requisites of it were complied with here either, 1st, by the written memorandum of the contract of sale, on which was subscribed the name of the purchaser, made at the time by the auctioneer, who was to be considered as the agent of both parties, according to the case cited. And they contended that the conditions of sale being on a separate piece of paper made no difference; being exhibited together with the paper so subscribed at the time of the sale, as forming part of the terms on which the contract of sale was to be made: and that it was not necessary for the two papers to be attached to each other by a pin or other fastening; for the same objection might still be made that whether so attached or not at the time must be proved by parol evidence. But that if the objection had any weight, it would go the length of proving that no parol evidence could be given to shew that the printed conditions exhibited at the time of the sale were part of the terms of sale, since they were not

(*a*) [illegible] 1 Bos. & Pul. 563, 2, and 3 East, 322.

(*b*) Annexed

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annexed to the written contract subscribed with the purchaser's name by the auctioneer. Or, 2dly, that at any rate the case was taken out of the statute by a *part delivery* of the goods sold; which the delivery of the samples must be taken to be; being accounted for as part of the quantity sold, and included as such in the weight at the king's beam, by which the duties were ascertained.

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On the part of the defendants it was urged, 1st, that the words of the 17th section of the statute comprehended all contracts for the sale of goods for 10*l.* or upwards, without any distinction between sales by auction and other sales: though if the positive words of the statute could be dispensed with by general reasoning, the frequent disputes which arose at public sales, concerning the terms of the bidding, shewed that they were as much within the mischief meant to be guarded against as any other sales: the condition might be varied during the sale, or a new condition added; or one set of conditions might be substituted for another afterwards. 2dly, Supposing such sales to be within the statute, it was contrary to the plain fact to consider the auctioneer, who was appointed and paid by the seller alone, and over whom the purchaser had no control, as the agent of the latter. That the memorandum made by the auctioneer of the purchaser's name and the sum bid was merely for the private information of his employer, and which the buyer had no right to inspect. And they denied the authority of *Simon* v. *Metivier* on both points; which they said had been broken in upon, with respect to sales of *land* by auction, in *Walker* v. *Constable* (*a*) in *C. B.*, *Stansfield* v. *Johnson* (*b*) before Ld. C. J. *Eyre*, and by the Master of the Rolls in *Buckmaster* v. *Harrop;* (c) and though sales of land depend upon another section of the statute; yet in this respect there is no distinction in reason between the two. (*d*) 3dly, They argued, that supposing the auctioneer to be the agent of both parties, yet

(*a*) 1 *Bos. & Pull.* 306. (*b*) 1 *Esp. N. P. Cas.* 101.

(*c*) 7 *Ves. jun.* 345. But Vide what was said by Lord *Eldon* C. in *Coles* v. *Trecothic*, 9 *Ves. jun.* 249.

(*d*) By the 4th sect. to affect lands, the note, &c. must be signed by an agent thereunto lawfully authorised *by writing*, &c. which words "*by writing*" are omitted in the 17th sect. touching the sale of goods.

here

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here was no sufficient memorandum in writing of the bargain; because there was no connection either external, or internal by words of reference or by the context, between the paper signed by the auctioneer and the other paper containing the conditions of sale, and which were part of the bargain of sale; and it was the same as if the auctioneer had verbally declared those conditions. That the statute did not go to exclude parol evidence of the real terms of the contract, for otherwise the check intended by the statute would be nugatory; but only to nullify the contract so made, unless the terms were committed to writing and signed, &c. That neither, 4thly, did the delivery of the samples take the case out of the statute; because the samples were delivered diverso intuitu, to enable the purchaser to compare the bulk of the goods with them, to see that they corresponded, or to sell by them again; and not as a part of the bulk itself. And that it made no more difference that the samples were included in the weight at the king's beam, than if a quantity of cloth were first measured and then sold, and a small strip were cut off by way of sample to identify the bulk or to shew to customers. Besides which, the duties were to be paid by the seller; and whether he were guilty of laches or not in not having paid them before the accident, yet the bulk could not have been delivered to the purchaser out of the king's warehouse till the duties were paid; but an absolute sale to change the property implies a present power of delivery at the place where the goods are.

The Court said they would deliver their opinion on the next day; which was now done by

Lord ELLENBOROUGH C. J. This was the case of a sale by [567] auction of sugars in the king's warehouse, and which were afterwards burnt whilst they remained there under the king's lock and deposited there for the receiving of the king's duties. And the question is, Whether such a sale of those goods has taken place as is sufficient *to change the property*, and to make them the goods of the purchasers? The goods were put up to sale on the 20th of *September*, in pursuance of a catalogue of sale which had been previously distributed for that purpose, containing the lots, marks, number of hogsheads, and gross weights of the sugars, and referring for further particulars to the brokers; and they were sold on that day, according to certain conditions of

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of sale, which the auctioneer read to the bidders assembled, as the conditions on which the sale of the sugars enumerated in the catalogue was to be made; (his lordship here described the catalogue and read the conditions of sale, as before stated;) and the auctioneer also informed them that the duties were not then paid, but would be paid by the sellers on the morrow. It is admitted however that no laches is imputable to the sellers for the non-payment of the duties between the time of sale and the fire, which happened on the 22d of *September*. Two questions have been made on the 17th section of the statute of frauds, upon which questions it depends whether what has passed between the parties as to those goods constituted a valid contract of sale in respect to them. The first question argued upon the latter words of that section is this; Is the writing which has been put upon the catalogue of sale by the auctioneer "*a note or memorandum in writing of the bargain* made and signed by the parties to be charged by the contract, or *their agents* [568] *thereunto lawfully authorised*," within the meaning of the statute? The second question is, Whether this be a case in which the buyer can be said to have "accepted *part of the goods sold, and actually received the same?*" But independently of and besides these questions, it has been said that sales by auction are not within the statute; and the case of *Simon* v. *Motivos*, reported in 3 *Burr.* 1921. and 1 *Blac. Rep.* 599. has been relied on. The report in *Burrow* does not distinctly mention this latter point. But in the report of Sir *W. Blackstone*, Lord *Mansfield*, speaking of sales by auction, says, "The solemnity of that kind of sale precludes all perjury as to the fact itself of sale." He then mentions the case of a sale of sugars by auction, which were "afterwards consumed by fire in the auction warehouse, and where the loss fell upon the buyer." He afterwards adds, "according to the inclination of my present opinion auctions in general are not within the statute." And Mr. Justice *Wilmot* says that he "inclined to think that sales by auction, openly transacted before 500 people, are not within the statute." With all deference to these opinions I do not at present feel any sufficient reason for dispensing with the express requisition of a memorandum in writing in a statute applying to all sales of goods above the value of 10*l.*, without exception, merely because the quantum of parol evidence in the case of an auction

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is likely to render the danger of perjury less considerable. That argument in a degree applies to all sales in market overt: and if we once get loose from the positive words of the statute, it will become a question only of the quantum and degree of danger of perjury in each particular instance: which opens a door to an indefiniteness of construction founded on all the varying circumstances of the time and frequency of persons attending the place of sale, and the like: which would be destructive of [569] all certainty of practice, and render the rule of the statute perhaps more mischievous than beneficial to the trading world who are to be governed by it. I am not therefore prepared to say that sales by auction are not meant to be comprehended within the statute. Nor would I be understood as giving any conclusive opinion to the contrary: neither is it necessary that I should upon the present occasion. The first question on the letter of the statute is, Is this a memorandum of the bargain made *by an agent of both parties?* In respect to sales of goods, it has been uniformly so holden ever since the case of *Simon* v. *Motivos;* and it would be dangerous to break in upon a rule which affects all sales made by brokers acting between the parties buying and selling, and where the memorandum in the broker's book, and the *bought and sold notes* transcribed therefrom and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute to render the contract of sale binding on each. All the great transactions of sale in this great city are so conducted, and stand on this foundation of legality only: and it is too late, I conceive, to draw it into question. Supposing the auctioneer or broker for sale to be the agent of both parties, the question then is, has he made a memorandum of the bargain in this case? and it appears to me that he has not. The minute made on the catalogue of sale, which is *not annexed* to the *conditions of sale*, nor has any *internal reference thereto* by context or the like, is a mere memorandum of the name of a person, whom perhaps we may *intend* to be *the purchaser*, and of the quantity and price of the goods, which we may perhaps on the foot of such memorandum also *intend* to have been *sold* to the person so named in the catalogue. But in treating it as such memorandum [570] throughout, we must intend also (contrary to the fact) that the goods were sold for ready money, and unattended by the circumstances

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cumstances specified in the conditions of sale. And the conditions of sale, though as unsigned they cannot be evidence of the bargain itself, are yet capable of being given in evidence; and accordingly have been so, as a part of the transaction between the parties, and in order to shew that it was on those conditions that the goods were sold. I am of opinion therefore that the mere writing on the catalogue, not being by any reference incorporated with the conditions of sale, is not a memorandum of a *bargain* under those conditions of sale.

As to the next question on the statute; inasmuch as the half pound sample of sugar out of each hogshead in this case is, by the terms and conditions of sale, so far treated as a part of the entire bulk to be delivered, that it is considered in the original weighing as constituting *a part of the bulk actually weighed out to the buyer;* and to be allowed for specifically, if he should chuse to have the commodity re-weighed; I cannot but consider it as *a part of the goods sold under the terms of the sale, accepted and actually received as such by the buyer.* And although it be delivered partly *alio intuitu*, namely, as a sample of quality, it does not therefore prevent its operating to another consistent intent also in pursuance of the purposes of the parties as expressed in the conditions of sale, namely, *as a part delivery of the thing itself* as soon as in virtue of the bargain the buyer should be entitled to retain, and should retain it accordingly.

As to the last point made in argument, viz. that there has
[571] been no effectual sale in this case made, because the commodity was incapable of delivery till the king's duties were paid, and which were to be paid by the seller; I think that the sale, within the meaning of the parties to the conditions, was complete, so as to cast the subsequent risk of loss upon the buyer. The words, "time of sale," and "highest bidder to be the purchaser," all evidently relate to the transaction of selling at the time and place of auction; which was considered between them as effectual for the purpose of transferring the property and the consequent risk of loss from the buyer to the seller, notwithstanding the intermediate right of custody or lien upon the goods in the crown until the duty should be paid. Besides, after earnest given, the vendor cannot sell the goods to another without a default in the vendee: and therefore if the vendee do not come and pay for and take away the goods, the vendor ought

ought to go and request him; and then if he do not come and pay for and take away the goods in a convenient time *the agreement is dissolved*, and the vendor is at liberty to sell them to any other person. Per *Holt* C. J. in *Langford* v. *Administratrix of Tiler*, *Salk.* 113. So in *Noy's Maxims*, 88. it is said, "If I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered; yet the *property* of the horse is *by the bargain* in the bargainor or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse, or have an action of detainment. And *if the horse die in my stable between the bargain and the delivery*, I may have an action of debt for my money, because *by the bargain the property was in the buyer*." On this latter ground, therefore, I do not think that the sale is incomplete. And as the statute has been satisfied by a part delivery of the goods sold, accepted by the buyer, I think the contract of sale valid as far as respects the statute also, and that the rule for a new trial should be discharged.

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Some of the Judges on the bench conceiving that the Lord Chief Justice had questioned generally the authority of the case of *Simon* v. *Metivier*, desired to have it understood that they concurred in the judgment delivered in this case, on the ground that a part delivery of a thing bought (which they considered the delivery to and acceptance of the samples by the buyer to be in this case) took the case out of the statute; leaving the authority of that case to stand as it did before on its own ground, untouched and unsanctioned by the present decision. But the Lord Chief Justice declared, that the only part of that case which he meant to question, though it was unnecessary at present to decide upon it, was the opinion thrown out that auctions were not within the statute, of which he should reserve his approbation for future consideration. But as to the other point there decided, that supposing sales by auctioneers or brokers to be within the 17th section of the statute, the auctioneer or broker must be taken to be the agent of both parties, the practice had become so settled since the decision of that case, that it would be dangerous to shake it, and it was not his intention to question it.

Rule discharged.

The

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Saturday, June 21st.

The KING *against* The Commissary of the Consistorial and Episcopal Court of the Bishop of WINCHESTER in and for the parts of SURREY.

Where there is no regular presiding sworn officer at an election (e. g. of churchwarden, one of whom by custom was chosen by parishioners paying scot and lot, and the other appointed by the rector, which latter in fact presided) the controul of the election devolves at common law upon the electors themselves: but unless there be a custom to regulate the time for making such election, it is not competent to a majority of the electors assembled at the time of such election to narrow the period which the common law would allow; and therefore a resolution by them that it shall conclude at a given time must at least limit a time reasonable in itself with respect to numbers and distance, and be of sufficient notoriety. But whether a resolution by a majority of the vestry on the first day of the election to close the poll at 4 o'clock on the next day in the parish where the number of electors did not exceed 180, and where the affidavits stated a custom for 200 years not to keep the poll open for more than two days, and no instance within living memory of extending it beyond 4 o'clock on the second day, were sufficient to warrant the closing of the poll at that time, while some of the voters were still coming to poll, and others had no notice of the resolution; was a fit question to be tried upon a mandamus.

THIS was a rule calling upon the commissary of the bishop of *Winchester* to shew cause why a mandamus should not issue to him, his deputy, or other competent judge in this behalf, commanding him to swear and admit *S. Russell* into the office of one of the churchwardens of the parish of the *Holy Trinity* in *Guildford, Surrey*. The affidavits in support of the rule stated an immemorial custom in this parish for persons paying scot and lot to the parish in the vestry-room thereof annually, to nominate and appoint, and in case of an opposition to vote in the election of, one churchwarden of the parish; and for the rector to appoint the other; and that such appointment and election should take place on *Easter Monday* in every year. And that as far back as the books of the parish exist, viz. for the last two hundred years, it appears that whenever a poll for churchwarden has occurred, entries of the votes given have been made by the persons polling of their names or marks. That no instance occurs in the books of a poll for the parish churchwarden having been kept open for more than two days; nor was it ever known within living memory for about 60 years past during which three such polls were remembered, (one in *which Mr. *Martyr* was the successful candidate) that they were ever continued beyond 4 o'clock in the afternoon of the second day. And this, in the judgment of the deponents, was a

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sufficient time, the number of voters not amounting to 180. That on last *Easter Monday*, *April* 7th, the persons paying scot and lot to the parish assembled at the vestry-room to elect one of the churchwardens, when the rector appointed *W. Sadler* a churchwarden. After which two eligible candidates, Mr. *Martyr* and Mr. *Russell*, were proposed and seconded by different inhabitants paying scot and lot, to fill the office of the other churchwarden; and a poll being demanded, the persons entitled proceeded to give their votes until 4 o'clock in the evening of the same day; Mr. *Sadler* being in the chair, and the vestry-clerk taking the votes as usual. That at the commencement of the poll it was agreed, without any dissentient voice, that at the close of the poll for that day, at 4 o'clock, a time should be fixed for the final termination of such poll: and accordingly, at 4 o'clock on that day, the numbers for Mr. *Russell* being then 26, and for Mr. *Martyr* 23, and several of the respective friends of the parties having come to the vestry-room for the purpose of fixing the time for the final close of the poll, after taking the sense of the meeting, the following order was made and entered, "*April* 7th, 1806, by order of the vestry, it is determined, that the poll for the election of churchwarden for the parish, &c. shall be finally closed on the 8th of *April*, at 4 o'clock in the afternoon of that day, as subscribed by the majority of the persons then assembled, amongst whom was the overseer of the poor who had before voted in favour of Mr. *Martyr*, though two of his friends, who had been present in that meeting, and agreed to fix a time at 4 o'clock for finally closing the poll, quitted the room, without signing such resolution." And the deponents deposed to their belief, that this resolution was generally known throughout the parish, and indeed throughout the town of *Guildford*, the same evening. That the poll was resumed on *Tuesday* morning, and closed at 4 o'clock on that day, pursuant to the prior resolution; one voter, who had before declared his vote for Mr. *Martyr*, being allowed to sign his name after the clock struck four: and on casting up the votes, there appeared to be for Mr. *Russell* 67, and for Mr. *Martyr* 52; whereupon the former was declared duly elected; and afterwards presented himself to the commissary to be sworn into the office, which the commissary refused to do, alleging that a caveat had been entered against him by Mr. *Martyr*.

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That not more than two other persons claimed to vote at the election, who were prevented by the closing of the poll at four o'clock on the *Tuesday*. The affidavits in answer to the rule stated that Mr. *Martyr* was in *London* at the time of the election, and did not return to *Guildford* till some days afterwards. That he never authorised any person to consent to closing the poll at 4 o'clock on the *Tuesday*, and that the same was done without his privity or consent. That to the best of the deponent's knowledge and belief it has not been usual to close the poll on such elections until all the persons having a right to vote have voted, without the express consent of the candidates; and that such consent was given in 1796, in the election, when Mr. *Martyr* was the successful candidate. That when the poll was closed on the present occasion there remained 43 persons entitled to vote, who had not given their votes, several of whom would have voted for Mr. *Martyr*, if not prevented by the closing of the poll at that time; and in particular, five voters
[576] deposed that they went to the church about 4 o'clock on the *Tuesday* for that purpose, but were told they were too late; and a sixth deposed that he did not know of the resolution for closing the poll then, and that it was his intention to have voted for Mr. *Martyr* if his vote would have served his election: and others deposed that they had protested against the resolution for closing the poll on the *Tuesday*, but were overruled by a majority of the vestry present.

Best Serjt., *Garrow*, and *Peake* shewed cause against the rule, and contended that no resolution of the vestry to close the poll at any particular time was legal; at least not without sufficient previous notice given to all the electors of such a resolution being intended to be made; but that the poll must be kept open as long at least as the voters were continuing to come in to vote, and until such an interval elapsed without any voter coming in as made it reasonable to conclude that no more intended to vote. That it was plain that that period had not arrived, as the poll was closed while the voters were still coming in to vote, and while above forty voters remained unpolled. And they also denied that 4 o'clock the second day was a reasonable time for closing the poll, as the right of voting was not confined to residents in the parish; and the notice given the day before might not be in time to reach the non-residents, even

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if it were sufficiently notorious within the parish; which they denied that it was.

Sir *V. Gibbs*, contrà, relied upon the custom stated in the affidavits, for the majority of the vestry to resolve on the first day at what hour on the second day the poll should be closed, and 4 o'clock appeared to be the latest * hour for that purpose; which he contended was a reasonable time for 180 voters to poll, and sufficient, unless any of them kept back for the purpose of serving a particular candidate who wished for delay. He observed, that there appeared no right in the rector's churchwarden to preside at the election, and therefore the right of adjournment and of regulating the manner and time of taking the poll devolved by common law, according to *Stoughton* v. *Reynolds*, (*a*) upon the whole body of electors, to be exercised as in other cases by the majority assembled. And notice of the intention to come to such a resolution on the first day was rendered unnecessary by the custom. At any rate, sufficient colour of an election was shewn to warrant the issuing of the mandamus to try the validity of it.

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Lord ELLENBOROUGH C. J. The custom stated is a sufficient foundation for the Court to grant a mandamus. I cannot make out upon these affidavits how the rector's churchwarden was a good presiding officer: he is not sworn. Then here was an election under the controul of the electors themselves; and if there were a custom to determine it at a certain period that would govern: but without any custom there must be some limit, if the limit were assigned by a competent authority, and were in itself reasonable. Now putting out of the question the resolution of the vestry on the first day to determine the election at 4'clock in the evening of the second day, it still appears that for 200 years past there has been no instance of an election of churchwarden continuing beyond 4 o'clock on the second day. I see nothing unreasonable in this limit; and at any rate it is sufficient to warrant us in letting the mandamus go.

GROSE J. declared himself of the same opinion; relying on the custom stated, which appeared to allow reasonable time for the voters to come in. And he observed that this was not like an election of members to serve in parliament, which might

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(*a*) 2 *Str.* 1045

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happen at any period; but here the election commenced annually on a certain day, *Easter Monday*, which was known to all the voters, and therefore they were less open to be surprised.

LAWRENCE J. It is true that the electors cannot narrow the time which the common law or custom would allow for making the election; yet there being no instance, as appears by the affidavits, of a poll for the election of churchwarden in this parish continuing open beyond 4 o'clock on the second day, it is evidence of its being part of the custom that the votes must be given within that time: and here too notice fit and reasonable in itself was given the day before at the vestry that the poll would be then closed. The only doubt which I feel is, whether that notice were sufficiently public

LE BLANC J. If there had been no custom, there would have been a difficulty in the case: but if there be a custom to conclude the poll at a certain time, that being a reasonable time, the voters must tender their votes within it: and this is fit to be tried.

It was then agreed that the validity of the election should be tried in an issue.

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Saturday, June 21st.

The KING *against* HOPKINS and Wife.

The Court will grant a habeas corpus to bring up the body of a bastard child, within the age of nurture, for the purpose of restoring it to the custody of the mother, from whose quiet possession it was taken at one time by fraud and afterwards by force: and this without prejudice to the question of guardianship, which belongs to the Lord Chancellor representing the King in Chancery.

GARROW moved yesterday, on behalf of the mother of an infant bastard child, for a writ of habeas corpus directed to the Defendants who had gotten possession of the child, to bring it before the Court, in order that it might be restored to her. The affidavits, which were very long, stated minutely all the circumstances of the birth of the child, and the subsequent events attending the tracing of it into the possession of the defendants; from whence it appeared that the child was born and soon after baptized in *November* 1803: that in *August* 1805 the defendants obtained possession of it by stratagem and pretence; but soon after returned it to the mother; from whom

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The KING *against* HOPKINS.

it was again taken by force by Mrs. *Hopkins* and two soldiers in *January* 1806.

Lord ELLENBOROUGH C. J. had some doubt upon the opening of the case whether the Court could interfere on behalf of the mother of an illegitimate child, who had no legal right to the person of the child, and the question of guardianship belonging to another forum, with which the Court could not interfere; and the child not being of an age to complain for itself of any illegal restraint on its person. He therefore desired the matter to be mentioned again on this day, when the Court would have had an opportunity of looking into the case of Dr. *Mosley*'s child. (*a*)

Accordingly on this day, the matter being again mentioned and the substance of the affidavits fully stated; [580]

Lord ELLENBOROUGH C. J. said: It appears that the mother of the child, so called, had in her quiet possession, under her own care and protection, during the period of nurture. That she was first divested of her possession by stratagem, and after recovering it again was afterwards dispossessed of it by force. In such a case every thing is to be presumed in her favour. Without touching therefore the question of guardianship, we think that this is a proper occasion for the Court, by means of this remedial writ, to restore the child to the same quiet custody in which it was before the transactions happened which are the subject of complaint; leaving to the proper forum the decision of any question touching the right of custody and guardianship of this child with which we do not meddle. (*b*)

Writ granted.

(*a*) Vide 5 *East*, 224, n. and *Rex* v. *Soper*, 5 *Term Rep.* 278.
(*b*) Vide *De Manneville*'s case, 10 *Ves. jun.* 59.

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Saturday, June 21st.

GOULD and Another *against* HOLMSTROM.

Bail in error, who were excepted to and did not justify, were relieved from proceedings against them, though no other bail had been put in; but they were made to pay the costs up to this time, the plaintiff having been induced by former cases to proceed against them.

UPON a rule nisi for entering an exoneretur upon the bail-piece, and to stay proceedings against the bail in error, it appeared that judgment was signed in this, the original action, in *Trinity* term 1805; and on the 16th of *July* following a writ of error was brought, when *Pitt* and *Gerrard* were put in as bail in error, who were excepted to on the 20th; and on the 24th a notice of justification was given that they would justify, on the * first day of *Michaelmas* term last: but they never did justify, though they remained on the bail-piece; and on the 20th of *January* 1806 the writ of error was nonprossed for want of the bail justifying.

Park and *Bowen* shewed cause against the rule, and contended that the bail were liable, though they were at first excepted to and had not justified; for they still remained upon the bail-piece, and might have rendered their principal; (*a*) and he had had all the benefit of delaying the original Plaintiff's suit by means of such bail put in. They said that there was no instance of the first excepted bail being exonerated unless other bail had been put in and justified; as in *Jones* v. *Tubb*, (*b*) *Fulke* v. *Bourke*, (*c*) and *Waller* v. *Green*. (*d*)

* [581]

Sir *V. Gibbs*, in support of the rule, said that the only necessity for bail in error since the statutes of *Car.* 2. was to stay execution; but they must be such bail *as the Court shall allow of;* (*e*) and that description does not apply to bail excepted to and not justifying. The defendants in error by excepting to, reject as far as in them lies, the bail, and make their election to sue out execution on the original judgment if the bail do not justify; which they might have done in this case. And it is no objection that the original plaintiffs were prevented from suing out execution during the long vacation; for so they would have been before the stat. 16 & 17 *Car.* 2. *c.* 8. *s.* 3. being

(*a*) Vide *Rex* v. *The Sheriff of Essex*. 5 *Term Rep.* 633.

(*b*) 1 *Wils.* 337. and *Sayer*, 58. (*c*) 1 *Blac.* 462. (*d*) *Sayer*, 303.

(*e*) Vide 3 *Jac.* 1. *c.* 8. made perpetual by 3 *Car.* 1. *c.* 4. *s.* 4, and 13 *Car.* 2. *st.* 2. *c.* 2. *s.* 9. and 16 & 17 *Car.* 2. *c.* 8. *s.* 3.

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GOULD and Another *against* HOLMSTROM.

tied up by the writ of error. Besides, it was according to the practice of the Court in this case to take till the then next term to see whether the bail should be allowed or not, of which no party can complain. At any rate the plaintiffs should have withdrawn their exception to the bail before they proceeded against them.

The Court then said that the party who takes exception to the bail put in considers them as no bail unless they justify, and therefore not having justified they must be considered as no bail. But inasmuch as the bail had neglected to apply to the Court to be struck out of the bail-piece, by which the plaintiffs had been induced to commence proceedings against them, on the authority of the former cases, the Court directed the bail to pay the costs of those proceedings up to this time, and then to be discharged.

Rule discharged.

WARDELL *against* GOOCH.

Saturday, June 21st.

GARROW had obtained a rule calling on the Plaintiff to shew cause why the Defendant should not be discharged out of custody on filing common bail, on an affidavit that she was a married woman at the time of the debt contracted, which was for goods sold and delivered, and that the plaintiff knew it.

Sir *V. Gibbs*, who now shewed cause, said that it also appeared by affidavit that the defendant was living apart from her husband at the time, and had a separate maintenance. (*a*) But

* Lord ELLENBOROUGH C. J. said that he saw no objection to relieving her in this summary way; the plaintiff having dealt with her, knowing her to be a married woman.

Per Curiam, Rule absolute. (*b*)

The Court will discharge a married woman on filing common bail, who was sued for goods sold and delivered to her by the plaintiff, knowing at the time that she was a married woman, though living apart from her husband, with a separate maintenance.

(*a*) Vide *Corbett* v. *Poelnitz et ux.* 1 *Term Rep.* 5.
(*b*) Vide *Marshall* v. *Rutton*, 8 *Term Rep.* 545.

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Saturday, June 21st.

RICHMOND *against* JOHNSON, Clerk.

If there be a certificate against any more costs than damages upon the stat. 43 *Eliz. c.* 6. *s.* 2. the plaintiff shall not have the costs of the double pleas, on which all the issues were found for him, although the judge have not certified under the stat. 4 *Ann c.* 16. *s.* 5. that the defendant had probable cause to plead the several special matters; that section which says that "if "a verdict be "found on "any issue "for the "plaintiff, "costs shall "be given, "&c. unless "the judge, "who tried "the said is- "sue, shall "certify," &c. only applying to cases where one at least of the special pleas is found for the defendant, which would entitle him to the general costs.

TRESPASS for taking and carrying away the Plaintiff's goose, and converting it to the Defendant's use. Pleas, 1st, not guilty. 2d, (with leave of the court,) a justification, that the defendant, as vicar, &c. was entitled to the tithe of geese and that the plaintiff being liable, &c. rendered, and the defendant accepted the goose as tithe. 3d, (with like leave,) that the goose was taken by the license of the plaintiff: on all which issues were taken, and a general verdict was found for the plaintiff, on the whole, with 3*s.* damages. And the Judge having certified against any more costs than damages on the stat. 43 *Eliz. c.* 6. *s.* 2.; but not having certified on the stat. 4 *Ann. c.* 16. *s.* 5. that the defendant had a probable cause to plead the several special matters; a rule nisi was obtained for directing the master to allow the plaintiff the costs of the special pleas found for him, upon the authority of the stat. of *Anne*, which directs that if a verdict be found upon any such issue of the plaintiff, costs *shall* be given *at the discretion of the Court*, unless the Judge who tried the said issue shall *certify* that the defendant had a probable cause to plead such matter, &c.

**Walton* shewed cause against the rule, and argued that the stat. of *Anne* was not meant to repeal the statute of *Elizabeth*, and did not apply to a case where all the issues being found for the plaintiff, he would have been entitled to his costs, of course, except for the certificate granted under the statute of *Elizabeth*. But that the stat. of *Anne* only applied to cases where several justifications being pleaded which would bar the action, one of them is found for the defendant, which would entitle him to the costs of the cause: there, unless the judge certify that the defendant had probable cause to plead the other bars which are found for the plaintiff, the latter shall be entitled to deduct the costs of those unnecessary pleadings. And he referred

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to *Hovard* v. *Cheshire*, (*a*) as in point; where it is said to have been resolved at a meeting of all the judges, that if there be a certificate upon the stat. 43 *Eliz.* the plaintiff shall not have the costs of any plea pleaded with leave of the Court; although the issue be found for him, *and the judge have not certified that the defendant had a probable cause for pleading the matter therein pleaded.*

Hullock, in support of the rule, denied the authority of that case, and that the reasoning on which it was decided was not well founded. Before the statute of *Anne* a defendant could not plead more than one plea in bar, and when the legislature gave him the privilege to plead several bars, it was not meant that he should exercise it at the expence and to the oppression of the plaintiff: and therefore the statute directs that if a verdict shall be found on any issue for the plaintiff, costs shall be given, *unless* the judge certify. It is true that those [585] costs are there said to be *at the discretion of the Court;* but that is only as to the *quantum*, and does not extend to the denial of costs altogether. And if this construction hold, as it is admitted, where *one* of the issues is found for the defendant, à fortiori it must hold where they are *all* found for the plaintiff. And he referred to *Jones* v. *Davies*, (*b*) *Greenhow* v. *Isley*, (*c*) and *Duberley* v. *Page*, (*d*) as having put a different construction on the statutes to that adopted in *Hovard* v. *Cheshire*, and as having decided that the Court have no discretion under the stat. of *Anne* to deny the costs of double pleas found for the plaintiff, unless the judge certify for the defendant under that statute. And he put the case, that the plaintiff had demurred to one of the special pleas, and afterwards had obtained a general verdict for 3*s.* at the trial, and the judge had certified against more costs than damages under the stat. of *Elizabeth;* after which the plaintiff obtained judgment on the argument of the demurrer; it could not be supposed that the certificate of the judge at nisi prius could bar the plaintiff of the costs of his demurrer.

The Court observed, that in none of the cases cited by the plaintiff's counsel was there any certificate granted under the

(*a*) *Sayer*, 260.
(*b*) *Barnes*, 140.
(*c*) *Barnes*, 136.
(*d*) 2 *Term Rep.* 391.

statute

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statute of *Elizabeth* to deprive the plaintiff of full costs. And in order to try whether this were a case within the 5th section of the stat. of *Anne*, (and if it were not, it was admitted that the certificate under the stat. of *Elizabeth* would bar the plaintiff of his full costs, notwitstanding the double pleas pleaded by leave of the Court under the 4th sect. of the stat. of *Anne*,)

[586] they asked whether in this case, where all the pleas were found for the plaintiff, if the judge had certified under the statute of *Anne* that the defendant had probable cause for pleading them, and had not certified against full costs under the statute of *Elizabeth*, such certificate under the statute of *Anne* could have deprived the plaintiff of his costs? To which, if no satisfactory answer could be given, (and none was given) they thought it a material argument to shew that the 5th section of the stat. of *Anne* only applied to a case where one of the special pleas was found for the defendant. And presently after *Walton* drew the attention of the Court to the wording of that section; which was that "if a verdict shall be found upon any *issue* (not issues) in the said cause for the plaintiff, costs shall be given," &c.

Hullock referred also to *Dodd* v. *Joddrell*, (*a*) *Brook* v. *Willet*, (*b*) *Vollum* v. *Simpson*, (*c*) and *Bartlet* v. *Spooner*, (*d*) as further exemplifying the construction put upon the statute of *Anne*, which he had contended for.

Lord ELLENBOROUGH C. J. We will look into the cases, and if any doubt should occur we will mention it again. But at present I am inclined to think that the plaintiff is deprived of his costs by the certificate granted under the stat. 43 *Eliz.* It is clear that such would be the effect of the certificate, except so far as it is controlled by the 5th section of the stat. of *Anne*. That statute meant to give an advantage to a defendant of

[587] pleading several matters; though in so doing it provided that such privilege should not be exercised vexatiously to the plaintiff: therefore it says that if any *issue* shall be found for the plaintiff, he shall have costs, &c. unless, &c. by which I understand, that if any one or more of several issues be found for the plaintiff, the rest being found for the defendant, the plain-

(*a*) 2 *Term Rep.* 235. (*b*) 2 *H. Blac.* 435.
(*c*) 2 *Bos. & Pull.* 368. (*d*) *Bull. N. P.* 335.

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tiff shall have his costs of those pleas found for him, unless the judge shall certify, &c. This was to check a superfluity of pleading; and was necessary to be introduced where any one bar was found for the defendant, which would give him the general costs of the cause, except for this provision: but where all the issues were found for the plaintiff, he did not want any new provision to give him the costs of the pleadings. And this shews that the statute of *Anne* was not meant to apply to such a case. Where indeed the case is within the 5th section of that statute, as if upon a demurrer joined the matter be judged insufficient, the costs are in the discretion of the Court only as to the quantum; that is, to be taxed by the proper officer as in other cases; or if a verdict be found upon any issue for the plaintiff, &c. which is to be understood in the sense I have before mentioned: "unless the judge who tried *the said issue* shall certify," &c.; and in that case the defendant shall be exempted from the costs of those issues found for the plaintiff, which he would otherwise have been obliged to pay. But here the certificate under the statute of *Elizabeth* has taken away from the plaintiff all the costs as to all the issues to which he would have been entitled without the aid of the 5th section of the statute of *Anne*.

The other judges expressed their decided opinions that the 5th section of the statute of *Anne* had no reference to this case where all the issues were found for the plaintiff, and *Lawrence J.* added, that the question ought not to be disturbed after having been decided by the opinion of all the judges, as reported in the case in *Sayer*. [588]

Rule discharged.

The

Monday, June 23d.

The KING *against* The Inhabitants of the West Riding of the County of YORK.

By the common law declared and defined by the stat. 22 *H.* 8. *c.* 5. and subsequent acts, where the inhabitants of a county are liable to the repair of a public bridge, they are liable also to repair to the extent of 300 feet of the highway at each end of the bridge: and if indicted for the non-repair thereof, they can only exonerate themselves by pleading specially that some other is bound by prescription or tenure to repair the same.

AT the summer assizes at *York* in 1803, this indictment, found at the former assizes, was tried, for a nusance in not repairing a certain highway; upon which a special verdict was found, which was removed by certiorari before judgment into this court.

The indictment stated that from time immemorial there was and yet is a common and ancient king's highway, leading from the market-town of *Huddersfield* in the West Riding of the county of *York* towards and unto the market-town of *Manchester* in the county palatine of *Lancaster*, in, through, and over the township of *Quick* in the West Riding, &c. used for all the liege subjects of the king for themselves and with carriages, &c. to pass, &c. And that a certain part of the said highway, at the said township of *Quick* in the West Riding, &c. to wit, a certain part thereof lying *next adjoining the west end of a certain public bridge* there, called *Tamewater Bridge, and within the distance of* 300 *feet thereof*, beginning at the west end of the said public bridge, and extending from thence westwards, containing in length 45 feet, and in breadth seven yards, and a certain other part thereof lying *next adjoining to the east end of the said bridge*, and *within the distance of* 300 *feet thereof*, beginning at the * east end of the said bridge, and extending from thence eastwards, containing in length 150 feet, and in breadth seven yards, on the 2d of *March*, 42 *Geo.* 3. &c., at the said township of *Quick*, &c. was and yet is very ruinous and in decay for want of repair, &c.: so that the subjects of the king cannot safely pass; to the common nusance, &c. against the peace, &c. *and against the form of the statutes.* And *that the inhabitants of the West Riding of the county of* York the said common highway, so as aforesaid being in decay, *of right ought to repair and amend*, when and so often as it shall be necessary. To this the inhabitants of the West Riding pleaded not guilty; and upon the trial by a jury of the neighbourhood of the town of *Leeds*, being next adjoining to the West Riding returned by the sheriff,

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sheriff, according to a special writ directed to him for this purpose, a special verdict was found, stating in substance:

That from time immemorial there has been and yet is a common public highway for carriages, &c. from *Huddersfield* to *Manchester*, leading through the township of *Quick* in the West Riding of *Yorkshire*, and across the river *Tame* there flowing: and that from time immemorial until within time of living memory there was no bridge across the river *Tame* at *Quick*, except a foot bridge, and all persons having occasion to cross the river there with cattle and carriages went across a ford in the river; the foot bridge being a little higher up the river than the ford. That before the year 1756 a stone bridge for carriages, &c. called *Tamewater Bridge*, was erected by voluntary subscriptions at *Quick*, five or six yards higher up the river than the ford; which stone bridge was in that year swept away by a flood, when the bridge was rebuilt with stone by voluntary subscriptions, and made a little longer than the former bridge, [590] and erected at the ends of the said highway next the river; which continued until *August* 1799, when it was again swept away by a flood: and thereupon the same was again rebuilt with stone by and at the expence of the inhabitants of the West Riding, and was finished on the 2d of *March*, 42 *Geo.* 3. the day mentioned in the indictment, and still continues there. And that these several stone bridges have been publicly used, and have been and are of great public use and benefit; and that the present bridge has been maintained and repaired, and is maintainable and repairable by the inhabitants of the West Riding. That the present stone bridge was made by the inhabitants of the West Riding larger and wider than either of the preceding bridges; and that the parts of the highway next adjoining to the east and west ends respectively of the present bridge, (being the parts of the highway during the time that the same was so out of repair as in the indictment mentioned) were made higher in order to come up to the said bridge, and wider than they were before. That the township of *Quick* lies in the parish of *Saddleworth* in the said Riding, which parish has been immemorially divided into four districts called *Mears*, in one of which mears, called *Shaw Mear*, the highway in *Quick* next adjoining the west end of the bridge lies; and in another of which mears, called *Lord's Mear*, the highway in *Quick*

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Quick next adjoining the east end of the bridge lies: and that the inhabitants of these respective mears have respectively repaired and maintained from time immemorial the said respective parts of the highway adjoining the east and west ends of the ford before the building of the first mentioned carriage bridge, &c. and since adjoining to the respective ends of the present bridge when the same has been out of repair; and that the parts of the highway indicted, were out of repair, &c. But whether, &c.

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Holroyd for the prosecution. The Riding being liable to the repair of the bridge is in consequence liable to the repair of 300 feet of the highway adjoining each end of it. And no question can arise as to any special liability of the respective mears, because the general issue only is pleaded; and any question of that sort can only be raised by a special plea. The stat. 22 *H.* 8. *c.* 5. for repair of bridges and highways is framed upon the presumption that the inhabitants of the county were at common law bound to repair the bridges within the same, where no other persons were specially chargeable for such repairs; for the statute does not create the charge, but only directs the manner in which it shall be imposed. The same observation applies to the 300 feet of highway at each end of the bridge. It directs (*s.* 9.) that such portion of the highway shall be amended as often as need shall require, without saying by whom; and it directs the justices of the peace to inquire, hear, and determine in their sessions respecting the repairing of the same, "in as large and ample manner as they might do to and for the making and repairing of bridges by virtue of that act." Now the power given them is to tax the inhabitants of the county, which would be absurd and unjust, if they were not the persons bound to the repair of the highways at the ends of the bridge. The statute, therefore, being only declaratory of the common law, the particular and summary remedy therein prescribed need not be pursued; but an indictment lies at common law for the nusance. Lord *Coke*, (*a*) in his comment on this statute, not only considers that the county is at common law liable to the repair of bridges, (*b*) but also of the 300 feet

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(*a*) 2 *Inst.* 700, 1, 5.

(*b*) And vide *Rex* v. *West Riding of York*, 2 *East*, 346.

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of highway adjoining the ends thereof; one of them, as he says, depending upon the other. So in 13 *Rep.* 33. after saying that of common right all the county shall be charged to the reparation of a bridge, because it is a common easement for the whole county, and that the stat. 22 *H.* 8. *c.* 5. was but an affirmance of the common law. Lord *Coke* adds, " So it is of a *highway* of common right; all the *county* ought to repair it, because that the county have their ease and passage by it; which stands with the reason of the case of the bridge:" which shews that he was speaking of the highways at the ends of bridges. The reason is obvious, that where there is a bridge, it necessarily brings a greater concourse of persons from the neighbouring country to that spot, in order to pass the river with more convenience; and the repair of the highways at the ends of the bridge is no more than a compensation to the parish wherein the bridge stands for the increased use and expence of its roads. *Dalton* (*a*) and *Crompton* (*b*) are also of the same opinion. These refer to 43 *Assize, pl.* 37.: (*c*) where it was presented in *B. R.* that the abbot of *Combe* ought to repair *Chesterford* bridge, in the county of *Leicester;* to which he alleged a prior record in the same Court, by which he was charged with the repair of the same bridge; to which he pleaded that he was only bound [593] to repair two arches of it: and the issue being joined thereon, the jury found quod Abbas de C. non tenetur reparare nisi duas arches pontis de C. et pontem ultra cursum aquæ, *et non fines ejusdem pontis.* To which *Knivet* J. said, we must intend that you are bound to repair the bridge, *and the highway adjoining to each end of it,* although the soil be in another; because the easement shall be preserved to the people, &c. And as it is not found by the record who ought to repair the remainder of the bridge, without which the repair of the two arches will be of no use, you cannot go acquitted, but must answer over. This must have proceeded upon the same principle as where the owners of a certain estate are bound to the repair of a bridge or road, it is sufficient to indict any one who is in the possession

(*a*) *c.* 16. (*b*) 186. *b.*

(*c*) This is stated in *Bro.* tit. *Presentments in Courts*, 22 & 29. but more fully in *Fitz. Crompt. Just.* 186. and vide *Fitz. Nat. Brev.* 127. writ *de Reparatione Faciendâ.*

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of part of the estate, and he must get his contribution from the rest. So the subsequent statutes of the 1 *Ann. st.* 1. *c.* 18. *s.* 3. 5. & 13. and the 12 *Geo.* 2. *c.* 29. which are legislative expositions of the stat. of *H.* 8. assume the liability of the county to repair as well the highways at the ends of bridges as the bridges themselves.

Lambe contrà. Admitting that decided cases (*a*) have established the liability of the county to repair public bridges at common law; yet such liability has never been extended to the highways at the ends of bridges: nor does it attach in any case where any other persons are found to be liable for the repairs, as the mears are in this case. At common law the *parish*, and not the county, is bound to repair public highways within it; and therefore the county was not bound to plead specially;

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but it lay rather on the prosecutor to shew such special matter in the indictment as would charge the county, against common right, with the repair of the highways in question; as by reason of the statute of *Hen.* 8. and the appointment of the justices in pursuance of the directions of that act. [It was observed that the indictment charged the non-repair to be *against the form of the statutes.*] The statute only gives the justices a power to inquire, hear, and determine who are liable to the repair of bridges and highways, and to make such process upon every presentment before them against such as ought to be charged for the repair, "as it shall seem *by their discretions* to be necessary and convenient for the speedy amendment thereof." To avoid all difficulty as to the exact limit where the bridge ended and the common highway began, the justices had power given them to exercise their discretion within 300 feet how far the county (where no other was found specially liable to the repair) should repair it; and to that extent they are required to tax the inhabitants of the county. Then that method ought to have been pursued which the statute points out, and not the remedy by indictment, which is not given. The 3d section which expressly creates the duty of the county to repair decayed bridges, where, according to the 2d section, it is not known who else are liable, is silent as to the repair of the highways at

(*a*) They are all collected in *Rex* v. *The Inhabitants of the West Riding of Yorkshire*, 2 *East*, 342.

the

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the ends; and therefore no indictment lies in this case upon that general clause. And if this could be maintained it would take away the discretion which the act meant to vest in the justices. [Lord *Ellenborough* C. J. The discretion given is rather as to how much of the 300 feet is necessary to be repaired.] The discretion is as to the apportioning how much of the 300 feet should be repaired by the county, and how much by the parish, where, as is said in 2 *Inst.* 705. no others are found liable to repair the whole. The application should have been for a mandamus to the justices to apportion the respective parts. And this is analogous to other cases, as where highways are found to be narrow, a discretionary power is given by the general highway act to the magistrates on application in certain cases and within certain limits to widen them; but no indictment lies against the parish for not widening them. Neither can any instance be found of an indictment against a county for the non-repair of the highways at the ends of bridges. The case in 43 *Assize, pl.* 37. is merely the opinion of a single judge, and the result of it is not intelligible. The abbot, in answer to a presentment for the non-repair of a bridge, shewed by the finding of a jury on a former presentment, that he was only liable to repair two arches of the bridge; and yet he is not acquitted, because he did not repair the highways at the end of the bridge, or shew who else was liable. [Lord *Ellenborough* C. J. The case shews the general opinion then entertained that the highways at the ends of bridges were considered as excrescences of the bridges themselves, and that the liability to repair the one followed the other.] The statutes of *Anne* and *Geo.* 2. do not carry the matter further than the prior statute of *Hen.* 8.

Holroyd in reply. The argument of the defendants is founded upon the assumption that the county is not liable at common law to the repair of the highways adjoining the ends of bridges, which is contradicted by the authorities cited. The statute of *Hen.* 8. merely fixed the limit of the liability at 300 feet from the ends of the bridge, which before might have been doubtful at common law, or have depended upon the particular circumstances of each case. But the statute itself assumes the prior liability, and merely directs how the county shall be assessed. Then if the county be primâ facie liable at common law, it can

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only get rid of the indictment by shewing specially some other person bound by tenure or prescription to sustain the charge. *Rex* v. *The City of Norwich*, 1 *Stra.* 180. 182.

Lord ELLENBOROUGH C. J. As this case comes before us upon a special verdict, and will probably be carried further, we will consider it together; though I have no doubt at present upon the subject. I consider it as having been laid down long ago by Lord *Coke*, that the 300 feet of highway at the ends of the bridge are to be taken as part of the bridge itself; being in the nature of the thing intimately connected with it, and the exact limits difficult in some cases to be ascertained from the continuation of arches beyond the sides of the river. The stat. of *Hen.* 8. meant to define the limit which perhaps was uncertain at common law; but the statute still proceeds upon the assumption that there existed a common law liability for the county to repair the highways at the ends of the bridge as well as the bridge itself, as appendages to it. All the authorities cited go to shew that; and so do the requisitions of the subsequent statutes of *Anne* and *Geo.* 2. The only question is, Whether, as up to the time of the indictment for the non-repair of this newly erected bridge in the place of the former bridge, the means had been in the habit of repairing the highways at the ends of the bridge, that makes any difference? But it seems to me that the new bridge, having been once adopted [597] as a public bridge, must be taken to be so with all its consequences and appendages. And even if that were otherwise, it may be proper to consider whether the special matter found by the jury should not have been pleaded.

Cur. adv. vult.

His Lordship now delivered the unanimous opinion of the Court. After stating the indictment and special verdict—

The single question arising on this special verdict is, Whether the highway, adjoining a common public bridge, at each end thereof, to the extent of 300 feet from the bridge, is of common right to be repaired by the inhabitants of the County or Riding in which such bridge stands? Or, in other words, Whether a different rule of law prevails with respect to the 300 feet of the highway at each end of a public bridge from that which prevails with respect to the bridge itself? for it seems to be admitted in argument on the part of the defendants, that this *Tamewater Bridge*

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Bridge is of common right to be repaired by all the inhabitants of the West Riding; and that if the highway at each end of it, to the length of 300 feet, be by the common law subject to the same rule, as to repairs, as the bridge itself, that, notwithstanding the facts found by this special verdict, inasmuch as the defendants have pleaded only *Not guilty*, and not shewn by plea that any other persons are bound by tenure or prescription to repair it, the common law liability of the defendants must remain. After the case of *The King* against *The Inhabitants of the West Riding of Yorkshire*, 5 *Burr.* 2594. respecting the bridge over *Glusburne Beck*, it could not be argued that this bridge, though built originally by subscription in lieu of a foot bridge, having become of public use and benefit, was not chargeable on the Riding at [598] large. But it has been endeavoured to separate the highway at each end of the bridge from the bridge itself, and to subject it to a different rule of law. This we think cannot be done. The highway within the limits of 300 feet at each end is dependent on the bridge as to its form and dimensions; its level must be varied as the bridge is made higher or lower, so as to make the ascent or descent more gradual: and we see no reason to construe the stat. 22 *Hen.* 8. as declaratory of the common law with respect to bridges, and introductory of a new rule of law with respect to the highways at each end of them. The stat. 1 *Ann.* stat. 1. *c.* 18. made for explaining and altering the stat. 22 *Hen.* 8. favours this construction: all its clauses and provisions coupling the bridge with the highway, and considering them as bound by the same rule of law with respect to the repairs of them. So the law was understood by the Judges in the time of *Ed.* 3., as appears by the case cited by Mr. *Holroyd* from the *Year Book*, 43 *Assize*, *pl.* 37. and referred to in *Bro. Ab. pl.* 22. *Presentments in Court.* The case is this—It was presented in the King's Bench before *Knivet* and *Ing*, that the abbot of *Combe* ought to repair the bridge of *Chesterford*, in the county of *Leicester*; upon which a distress was awarded against the abbot; who now came and alleged a record in the same Court of King's Bench, that how he was heretofore before *Chebre* impeached for the same bridge; when he came and pleaded that he was not bound to repair, except two arches of the same bridge; upon which issue was joined; and the inquest came and found for the abbot. Judgment if he should be now

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charged. And the record was read, which was, "Whereupon the jury, &c. who say upon their oaths that the abbot of *C.* is not * bound to repair, except two arches of the bridge of *T.* and the bridge ultra cursum aquæ, and not the ends of the bridge." *Knivet.* We intend that you are bound to repair the bridge, and the highway adjoining the one end of it and the other, although the soil may be in another; so that the easement shall be saved to the public. And you are bound to make the bridge of sufficient height and strength for the course of the water. And although by the accretion of water the ends shall be removed, yet you are bound to pursue the course of the water, and to repair the highway, without leave of him to whom the land belongeth. And inasmuch as in this case it is not found nor limited in the record who ought to repair the remainder of the bridge, and without doing so it will be of no value; although it should be found that the arches are sufficiently made, yet this shall not discharge you: therefore see whether you can say any thing else." From this case it is clear that in those days the charge of repairing the highways at the ends of a bridge was considered as belonging primâ facie to the party charged with the repair of the bridge itself. And the statute of *H.* 8. may be considered as having specified the distance of 300 feet from the ends of the bridges, for the purpose of reducing to more convenient certainty what should in all cases thereafter be considered as the extent and limit of this charge upon the county. We are therefore of opinion, that upon the facts stated on this record, judgment must pass for the crown.

Judgment for the Crown.

The

The KING *against* The Bishop of OXFORD.

Monday, June 23d.

THE former writ (*a*) having been quashed for insufficiency, a new rule was obtained, calling upon the bishop to shew cause why a writ of mandamus should not issue, commanding him to license the Rev. *Isaac Knipe*, clerk, to officiate as chaplain or curate of the church or chapel of *Piddington*, in the parish of *Ambrosden*, in the county and diocese of *Oxford*.

A chapel in the township of *P.* was endowed in 1428 by a deed executed by the then impropriator of the rectory, the then vicar, and the inhabitants of the township, and confirmed by the diocesan; whereby, in consideration of a yearly payment to the vicar, it was provided that the curate of the chapel should receive all the tithes due to the vicar from the said inhabitants, and should be appointed by them: under which deed they continued to exercise the power of appointment and presentation. In 1797 an act passed for inclosing open lands in the township, in which it is recited, as if a matter of doubt, whether the curate were entitled to the small tithes, or to a modus in lieu of tithes; the decision of which is left untouched by the act. In 1801, upon a vacancy, the inhabitants appoint and present a curate, upon an agreement signed by him and the principal inhabitants, wherein they state that he is appointed to the curacy, &c. *and to the money payment of 40l. 8s. 2d. annually, payable out of the lands and hereditaments in P.* in right of the said curacy, together with surplice fees, *and all other profits, privileges, and appurtenances to the same belonging, and of right payable.* That the inhabitants considering that sum not sufficient for the proper support of the curate had *voluntarily* agreed with him to pay a further annual sum of 29*l.* 11*s.* 10*d.*; with a *proviso* that it "shall not in any respect alter the money payment of 10*l.* 8*s.* 2*d. wherewith the said lands are and have been* TIME IMMEMORIAL *charged in right of the said church.*" Held that this agreement, entered into for the purpose of restraining the then curate from asserting his claim to the small tithes by due course of law, and furnishing evidence against his successors, was simoniacal, and the presentation made thereon void. And the right of presentation having thereupon devolved on the crown by stat. 31 *Eliz.* c. 6. s. 5. whose presentee had been licenced by the ordinary, a mandamus to the ordinary to licence another curate subsequently appointed and presented by the inhabitants, who had given notice of having withdrawn their former nomination and presentment and cancelled the agreement, was denied; and the rule was discharged with costs.

The affidavits in support of the rule stated, that from time immemorial there was a church or chapel in the township of *Piddington*, in which divine service and other ecclesiastical duties have immemorially been performed by a chaplain or curate in priest's orders, nominated and appointed by the inhabitants of the township, or the major part of them; which right either originated or was confirmed by a deed of 1428, between the then impropriator of the rectory of *Ambrosden*, the then vicar

(*a*) Vide *ante*, 345. S. C. upon another point.

of

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of the parish, and the inhabitants of *Piddington*, confirmed by the decretal order of the then diocesan. By that deed it was provided, that the curate should wholly receive all the tithes, real or personal, greater, lesser, or small, and all other emoluments and profits, &c. due from the inhabitants of the township to the vicar; in lieu whereof the said inhabitants were to pay to the vicar 20*s.* a-year. The affidavits then stated that the chapel became vacant on the 12th of *May* 1801 by the death of the curate. That in *June* 1801 one of the churchwardens of the township waited on the bishop, and informed him that the salary of 40*l.* a-year, which had been theretofore paid to the curate, not being considered by the inhabitants as sufficient, they had agreed to make an addition of 30*l.* a-year to it; to which the bishop appeared then to have no objection. That there was a meeting of the inhabitants on the 9th of *September* following, to nominate another curate, when Mr. *Stopes* and Mr. *Pearson* offered themselves as candidates; and the latter, having been nominated by a majority of the inhabitants, applied to the bishop for a licence: but the bishop, having inquired concerning the existence of a certain agreement between Mr. *Pearson* and the inhabitants, upon which he had been presented, and the agreement (as after stated) being then produced by Mr. *Pearson*, declared that he thought it simoniacal, and refused his licence. Upon which the inhabitants offered to cancel the agreement and wave their nomination; and on the 4th of *May* 1802, at another meeting, they nominated Mr. *Knipe*, who afterwards applied to the bishop for a licence and was refused; the bishop informing the parties that his objection to Mr. *Pearson*'s nomination, which he considered to be simoniacal, was not removed. It was further stated, that an action for simony had

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been brought by Mr. *Matthews*, (who had been nominated to the curacy by the crown) against several of the inhabitants who had signed the agreement with Mr. *Pearson*, in which action the plaintiff was nonsuited, at the summer assizes at *Oxford* in 1803: (but this, as it appeared by the affidavits against the rule, was upon a defect of formal proof.)

The agreement in question was as follows. "At a meeting of the inhabitants of *Piddington*, 9th *September* 1801, for the purpose of electing a resident curate or chaplain to the church of P., the Rev. *Isaac Pearson* was, by the inhabitants, appointed

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resident curate or chaplain, and to the possession of the parsonage house, and *also to the money payment of* 40*l.* 8*s.* 2*d. annually payable out of the lands and hereditaments in* P. in right of the said curacy, together with the said surplice fees and *all other profits, privileges, and appurtenances to the same belonging, and of right payable.* And the inhabitants aforesaid, considering the present stipend or money payment of 40*l.* 8*s.* 2*d.* with the surplice fees, of themselves insufficient for the proper support of such resident curate, have *voluntarily consented and agreed with the said J. Pearson,* that upon his entering upon such curacy at *Michaelmas* next, and performing the usual duties of the church, &c. together with such weekly duty as hath been customary and may be required, they, the said inhabitants, will, by a rate to be made by the churchwardens of *P.* now and for the time being, or by some other means, raise and pay out of the lands, and hereditaments in *P.* 29*l.* 11*s.* 10*d.* in addition to the said money payment, &c. Provided, and it is hereby agreed, that the payment of the said 29*l.* 11*s.* 10*d.* shall be made and continued only upon the occupiers of lands and hereditaments in *P.* aforesaid, and shall not, in any respect, [603] alter the money payment of 40*l.* 8*s.* 2*d. wherewith the said lands and hereditaments are, and have been, time immemorial, charged in right of the said church.* And lastly, the said *J. Pearson doth hereby consent and agree to accept the said curacy or chaplainship upon the terms herein before mentioned.*" (Signed by *J. Pearson,* and by the principal inhabitants and parish officers.)

The affidavits in answer to the rule, stated that in *June* 1801, when the meeting of the inhabitants of *Piddington* took place after the vacancy, the bishop was entirely ignorant of the rights of the curate: and was then informed that the salary was a fixed sum of 40*l.*; and enquiring how it was so settled, was referred by one of the parties to an act for the inclosure of the township of *Piddington.* That the bishop, under such ignorance of the rights of the curate, expressed his approbation of raising the stipend to 70*l.* a-year, as it was proposed to do. But upon reference afterwards to the *Piddington* inclosure act (about 1797,) it was found to recite that the chaplain or curate of *P.* was entitled *either to the small tithes or else to a modus or composition of* 18*s. for every yard land,* and so in proportion, in lieu of all tithing whatsoever: and it provides that nothing in the act contained

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contained shall extend to establish or annul, or to strengthen or weaken in any wise *the right or claim which the curate of* P. *had or might have to any small tithes*, or to determine or imply that he was or was not entitled to the same. And on subsequent inquiry it appeared that by the endowment of *Piddington*, in 1428, the curate was entitled to all the *small tithes;* in consequence of which the rights of the curate had been reserved by the act of parliament. That in the survey returned into the Exchequer in the time of Queen *Anne*, the curacy was valued [604] at 41*l.* 7*s.* 8*d.*: and the small tithes were now estimated at above 130*l. per annum;* and that the vicarage of the parish of *Ambrosden*, which was then returned at 42*l.* 5*s.* 3*d.* is now reputed to be worth 200*l. per annum*. That Mr. *Stopes*, the other candidate with Mr. *Pearson*, refused to sign the agreement in question as simoniacal in agreeing to accept 70*l. per annum* in lieu of small tithes; in consequence of which refusal the inhabitants nominated Mr. *Pearson* without opposition. That the inhabitants afterwards offered to give up the agreement, proposing however that Mr. *Pearson* should be bound in honour by it; to which the bishop gave his positive negative, and said that he felt it his duty not to licence any person who was not perfectly free to assert his rights. That in consequence of this agreement the nomination having been simoniacal and void, the right of nomination vested in the king, who on the 1st of *July* 1803 nominated the Rev. Mr. *Matthews*, to whom the bishop granted his licence accordingly.

The sole question now was, Whether the agreement in question were or were not simoniacal and void? upon which Sir *V. Gibbs* and *Abbott* were heard against the rule; and *Williams* Serjt., *Milles*, and *Manley* in support of it.

Lord ELLENBOROUGH C. J. In construing the agreement, whether it be simoniacal or not, I shall look only at the agreement itself, and the act of parliament, which states the doubt whether the curate be entitled to take the small tithes in kind or to a modus. This doubt is stated in an act of parliament which passed four years before the election; and yet when the inhabitants come to elect a curate they make a stipulation with [605] one of the candidates that he shall sign an agreement whereby he admits that 40*l.* 8*s.* 2*d.* is the *immemorial* money payment to the curate out of the lands of the township. He was therefore

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fore intended to be estopped by his own agreement from insisting upon the right of the curate to the small tithes, and to furnish evidence against the right, to be preserved probably in the parish chest. This I am clearly of opinion was simoniacal. If a presentee do but bargain with his patron to forbear any suit, for the purpose of trying by due course of law whether or not he be entitled to small tithes, that is an agreement for a *benefit* within the statute 31 *Eliz. c.* 6. (*s.* 5.) and amounts to simony.

GROSE J. It is impossible not to see that this agreement was a *benefit* to the inhabitants by whom the curate was appointed, and that it was so intended to be; and therefore simoniacal. And if the rights of the curate had been as well known at the time of passing the *Piddington* inclosure act, as they now appear to be, the provisions of it would probably have been very different. This Court, however, will not assist simony.

LAWRENCE J If the parties who present are to derive any *benefit* from their presentee, it is clearly simoniacal. Now if the presentee himself is not only to be estopped from claiming the small tithes, but is also to furnish evidence against future curates who might be disposed to claim them in favour of the parishioners, there can be no doubt but that it is simony. The agreement is artfully drawn, and on the first reading of it I doubted whether the words "*time immemorial*," (applied to the money payment of 40*l.* 2*s.* 8*d.*, wherewith the agreement states that the lands have been from *time immemorial* charged) [606] might not have been introduced by accident; but on consideration I am satisfied that they were introduced intentionally. Four years before, when the act passed, the matter was left in doubt, when it is evident that the intention of the parties concerned must have been called to the question; and that accounts for the parishioners introducing those words into the agreement, to endeavour to get rid of the curate's claim to the small tithes.

LE BLANC J. The matter must have been much discussed at the time when the local act passed, and the attention of the inhabitants must have been then called to the situation and claims of the curate. With this knowledge of the matter, the very next time that the inhabitants come to exercise their right of election, they require of the candidates to sign an agreement

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ment, including an admission that the annual payment of 40*l.* 2*s.* 8*d.* to the curate has been from *time immemorial.* That leaves no room to doubt but that this was purposely introduced into the agreement in order to affect the right of the curate. If this were a matter on which any question of law could reasonably be raised, I should be sorry to conclude the inhabitants of the township by denying the mandamus; but it being clear that this was done intentionally, and if so, that the agreement was simoniacal, we ought not to compel the bishop to do an act which his duty forbids him to do, and to put him to make a special return.

The Court thereupon, after alluding to what was said at the [607] conclusion of the case of *The King* against *The Bishop of Chester,* (*a*) upon the subject of applications of this sort against bishops, without a good foundation,

Discharged the rule with Costs.

(*a*) 1 *Term Rep.* 405.

Monday, June 23d.

TURNER *against* CARY and Others.

After default made in not putting in special bail in time, it is not enough that bail are afterwards put in; but the plaintiff may take an assignment of the bail-bond and proceed thereon, unless the bail be also justified, though not before excepted to.

UPON a rule for setting aside proceedings upon the bail-bond in this cause, it appeared that the writ of latitat, indorsed for special bail, was returnable on the first return of last *Easter* term, on which the Defendants were arrested, and a declaration filed conditionally. The time for putting in special bail expired on the 29th of *April:* but they were not put in till the 8th of *May,* when notice thereof was served on the Plaintiff's attorney, who refused to accept the notice as out of time, but did not except to the bail, and the bail did not justify. On the 12th of *May* the plaintiff took an assignment of the bail-bond, and commenced proceedings thereon the next day. The question was, Whether the bail-bond were well assigned after special bail was put in, but not perfected, not being excepted to?

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Comyn, who shewed cause against the rule, contended for the affirmative, and cited *Fuller* v. *Prest*, (*a*) to shew that the defendant, not having perfected his bail at the day, is not in court; and that the sheriff can only relieve himself afterwards by justifying the bail, though not excepted to.

Lawes, contrà, referred to *Pariente* v. *Plumbtree*, (*b*) and *Murray* v. *Durand* (*c*) there cited, to shew that the sheriff might redeem himself by putting in bail after an action commenced against him for an escape. Though, he observed, that in a subsequent case of the same sort, *Allingham* v. *Flower and Another*, (*d*) it is noticed that the bail had justified.

Per Curiam. The Master informs us, that by the practice of this Court the party making default must not only put in but justify bail before he can come to the Court for any favour.

Rule discharged with Costs.

(*a*) 7 *Term Rep.* 109. (*b*) 2 *Bos. & Pull.* 35.
(*c*) 1 *Esp. N. P. Cas.* 37. (*d*) 2 *Bos. & Pull.* 246.

MILNE and Others, Assignees of RHODES and JUSTAMOND, Bankrupts, *against* GRATRIX.

Monday, June 23d.

THIS came on upon two rules, one calling upon the Defendant to shew cause why an attachment should not issue against him for a contempt in not paying a certain sum under an award, the submission to which had been made a rule of this Court; the other calling upon the Plaintiffs to shew cause why the rule making the submission to the award a rule of Court should not be discharged. The facts were shortly these; the defendant having had dealings in trade with the bankrupts before their bankruptcy, and counter claims existing between

Where parties by bond agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of Court, it is competent to either, even since the stat. 9 & 10 *W.* 3. *c.* 15. to revoke by deed his submission; and notify the same to the arbitrators before the authority be executed; and he cannot be attached for a contempt of Court in not obeying the award, if made *after* such revocation and notice; though the submission be afterwards made a rule of Court. But it seems that it would be a contempt to revoke the submission after it had been made a rule of Court.

them,

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them, the assignees, after the bankruptcy, brought an action against the defendant to recover the value of certain goods of the bankrupts in his hands; and it was agreed to refer the whole matters in dispute. Accordingly, bonds of submission to arbitration were respectively executed by the plaintiffs and the defendant on the 23d of *August* 1805, to abide the award of two arbitrators if made on or before the 1st of *November* 1805, or otherwise to abide the award of an umpire if made on or before the 2d of *December* following. But on the 12th of *October* preceding, before the day appointed by the arbitrators for a hearing, the defendant executed a deed of revocation of his submission to the arbitration, of which the arbitrators and umpire had notice: notwithstanding which they proceeded upon the original bonds of submission, and appointed meetings to hear and determine the matters thereby submitted to them; and an award was made by the umpire within the time limited, dated the 2d of *December* 1805; after having been personally served with a copy of the deed of revocation on the 19th of *November* preceding. On the 6th of *December* the defendant was served with a copy of the award; and in *Hilary* term last the submission to the arbitration was made a rule of Court, at the instance of the plaintiffs; and a demand of the sum awarded was afterwards made on the defendant, who refused to pay it.

Wood and *Richardson*, for the plaintiffs, contended that a submission to arbitration, which was afterwards made a rule of Court under the stat. 9 & 10 *W.* 3. *c.* 15., (which rule of Court had relation to the submission) was irrevocable. They admitted that at common law the bond of submission would have been
[610] revocable, according to *Vynior*'s case; (*a*) but contended notwithstanding, that where the submission had been made a rule of Court, the Court would grant an attachment for disobedience to the award. (*b*) The object of the statute however would be defeated unless the submission were conclusive. The

(*a*) 8 *Rep.* 82.

(*b*) *Hide* v. *Petit*, 1 *Chan. Cas.* 185. In *Tremenhere* v. *Tresilian*, 1 *Sid.* 452. and 2 *Keb.* 645. 664. the general question as to the practice of the Court in granting attachments in such cases was adjourned for further consideration; but it was said that such attachments were constantly granted in *C. B.*

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title of it is, "An act for *determining* differences by arbitration," and in the body of the act it is said, that for the *final* determination of controversies, &c. be it enacted that it *shall and may be lawful* for all persons desiring to end any controversies, suits, &c. *to agree that their submission*, &c. *should be made a rule of Court;* which agreement being so made and inserted in their submission, &c. *shall or may be entered of record in such Court*, "and a rule *shall thereupon* be made by the said Court, that the "parties *shall* submit to *and finally be concluded by the arbitra-* "*tion*, &c. made pursuant to such submission;" and in case of disobedience, &c. the party shall be subject to all the penalties of contemning a rule of Court, &c. The statute therefore binds the party by his agreement to the submission. By such agreement the other party acquires an interest in the authority given to the arbitrator, which the statute directs shall be entered of record, and makes it, in the nature of process, imperative on the parties. If a Judge's order be made a rule of Nisi Prius by consent, neither of the parties can of his own accord annul the authority by revoking his consent. And in *Lucas* v. *Wilson*, (*a*) the Court said that the object of the act was to put submissions [611] to arbitrations in cases where there was no cause depending in court upon the same foot as those where there was a cause depending. The stat. 8 & 9 *W.* 3. *c.* 11. *s.* 8. only says that in actions on bonds for a penalty the plaintiff *may* assign as many breaches as he shall think fit: but this has been holden to be imperative on the plaintiff to assign breaches; (*b*) and here the words of the statute are stronger.

Holroyd, contrà, admitted that the defendant was liable on the bond; but denied that the statute made the submission irrevocable; and urged that there was no submission existing at the time it was supposed to be made a rule of Court on which the statute could operate. Where therefore the rule of Court itself, founded upon the supposed consent of the parties, was really made without the consent of the defendant, of course there could be no contempt of the jurisdiction of the Court in a matter where no such jurisdiction existed; and the party could have no notice of a rule made behind his back; which

(*a*) 1 *Burr.* 701.

(*b*) *Roles* v. *Rosewell*, 5 *Term Rep.* 538. and *Hardy* v. *Vern*, ib. 636.

would

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would be necessary to bring him into contempt. The umpire himself had no authority to make the award, and consequently there could be no contempt in not obeying a nullity.

Lord ELLENBOROUGH C. J. It has been properly admitted that the defendant could not destroy his agreement to submit to the arbitration, and therefore a remedy lies upon the bond given to secure such agreement. But it is equally clear that before the statute of *William* a submission to arbitration might be revoked before it was executed, and there is nothing in that
[612] statute to make it irrevocable while it continues executory. The statute says that it shall and may be lawful for the parties to *agree* that their submission should be made a rule of Court; which *agreement*, (that is, so long as it subsists as an agreement unrescinded,) shall or may be entered of record, &c. After it is made a rule of Court the party cannot indeed rescind it without incurring a breach of that rule; but till then it has its binding force as an agreement only, to submit to the award of the arbitrator, whose authority is in its nature revocable; and for the breach of which agreement the party here has a remedy of another sort. Then if before any award made one of the parties have revoked the authority of the arbitrators, they cannot make any award to bind him.

The other Judges concurred; *Lawrence* J. adding, that the rule for the attachment in this case was not for obeying *an award;* but if there were no authority in the umpire to make the award at the time, the award itself was a nullity, and could not be enforced.

Rule absolute for discharging the Rule for making the Submission, &c. a Rule of Court; and the Rule for an Attachment, for Non-performance of the Award discharged.

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HODGSON *against* FIELD.

Wednesday, June 25th.

TRESPASS for breaking and entering the close of the Plaintiff at *Heaton* in the county of *York*, and digging a pit or hole there, and for opening and uncovering a sough or drain in the said close, and continuing the said pit and sough open and uncovered for a long time, &c. and thereby disturbing the plaintiff in his possession and occupation of the said close. Pleas, 1st, not guilty. 2d, That the locus in quo at the times when, &c. was a piece of woody ground situate in *Heaton*, abutting to the south upon a brook there, and upon another part thereof contiguous and next adjoining to the parcel of woody ground situate in *Heaton*, and at the time of making the indenture after set forth mentioned as being in the possession of *Jaspar Pickard;* and that before the said times when, &c. viz. on the 13th of *July* 1747, one *Robert Stansfield* was seised in fee of the locus in quo, and one *Jeremy Marshall* was also seised of the parcel of woody ground adjoining thereto, and also of 35 acres of land in *Heaton* adjoining to the said parcel of woody ground; under which woody ground and other adjoining land of *J. M.* there * then were divers veins of coal which he was

A. and *B.* being severally seised of parcels of woody ground, and *B.* having other lands adjoining to his woody ground, and intending to make a colliery under his ground, *A.* grants to *B. his heirs and assigns*, liberty for him, *his heirs and assigns*, to carry up a sough or drain through *A.*'s woody ground *into B.*'s *woody ground*, and

also liberty for *B. his heirs and assigns*, to *make two little sough-pits* in *A.*'s woody ground, *for the more easy and safe carrying up the tail of sough*, one of which was to be covered in as soon as conveniently might be after making the sough, and the other to be kept open for examining the sough *so long as was necessary for that purpose, and no longer;* and *B.* covenanted that he, *his heirs and assigns*, would not damage the trees growing in *A.*'s woody ground, nor get any of the coals under it, except what should arise in the drift of the intended sough, and that *A., his heirs and assigns*, from time to time and at all times after might go down into any pit or pits of *B.*, his heirs or assigns, to discover whether any coals of *A.*, his heirs or assigns, should be gotten; and that *B.*, his heirs and assigns, should repair any injury to *A.*'s fence, &c.: held that by the grant to *B.*, his heirs, &c. of the liberty of *making the sough* in *A.*'s land, the liberty of making sough-pits at any time afterwards, while the object of the grant remained, *being necessary for the purpose of repairing the sough*, passed as *incident* thereto: and that the use of such sough, for the carrying up of which INTO *B.'s woody ground* liberty was granted, was not confined to the getting of coals under *B.'s woody ground*, but extended also to the *adjoining lands of* B.: and that the liberty of making new sough-pits for necessary repairs of the sough, after the two original sough-pits had been covered in by mutual consent, was not controlled by the special liberty given for making such original sough-pits, the uses of which were limited by the grant; it appearing upon the face of it that the grant of the sough was intended to have continuing operation while any coals in *B.*'s woody ground and adjoining lands remained to be gotten.

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desirous of winning and raising, &c. and of having the use and benefit of a sough for himself, *his heirs and assigns*, to be made and carried up as aftermentioned, for the purpose of draining the mines and works under the same, and thereby enabling him and them the better and more conveniently to dig and raise the said coal. That *Marshall* applied to *Stansfield* to grant to him for the purpose aforesaid the liberties and privileges mentioned in the indenture after set forth; and thereupon, by indenture of the 13th of *July* 1747, (since lost by time and accident,) *Stansfield granted to* Marshall, *his heirs and assigns*, full liberty *for him*, Marshall, *his heirs and assigns* to *carry up a sough from the bottom or edge of the hill near the brook in the locus in quo, in the said indenture called a parcel of woody ground in* Heaton, *&c. into the said parcel of woody ground of* J. M. *in* Heaton *aforesaid*, in the possession of *Jaspar Pickard;* which said two several parcels of woody ground are in the said indenture mentioned *to adjoin upon and lie contiguous to one another;* and also full liberty for *J. M., his heirs and assigns* to *make two little sough-pits in the said parcel of woody ground of him* R. S. near the edge of the hill or brook there, *for the more easy and safe carrying up the tail of the said sough;* one of the said sough-pits to be covered from the top of the said intended sough to the surface of the ground as soon as conveniently might be done after the making thereof, *and the other to be kept open for examining the sough so long as was necessary for that purpose, and no longer;* and also full liberty for *J. M., his heirs and assigns*, to get stones in *Stansfield*'s woody ground for making the intended sough, and for making and repairing such part of the fence or walls belonging to *Stansfield*'s woody ground as should be injured by J. M. his heirs or
[615] assigns. The plea then stated, that *J. Marshall*, by virtue of the said indenture, became seised of and entitled to the said liberties and privileges for the purpose aforesaid to him, his heirs, and assigns, as to the said parcel of woody ground and the said other lands of J. M. belonging and appertaining. That J. M. afterwards carried up the sough and made the two sough-pits, in manner aforesaid, and exercised the liberties and privileges so granted for the purpose aforesaid, as belonging and appertaining to his parcel of woody ground, &c. The defendant then by his plea deduced title to himself through several mesne conveyances from *J. Marshall* to *Marshall*'s parcel of woody ground

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ground and his adjoining land. The plea then further alleged, that *all the said seams and veins of coal* at or before the several times when, &c. *were not won from within and under the same parcel of ground and the same other lands, nor was all the coal then got or raised therefrom:* and that the said sough had been from the time of the making and carrying up of the same used and enjoyed for the purpose aforesaid, &c. as belonging and appertaining, &c. and until and at the several times when, &c. continued to be useful, &c. And because the said sough at the several times when, &c. was ruinous and obstructed for want of repairing, opening, and cleansing thereof, the defendant justified the entering the locus in quo and making the said pit or hole, and opening and uncovering the sough, &c. *for the purpose of the needful and necessary repairing, opening, and cleansing the sough for the uses and purposes in that behalf aforesaid.* The replication to the special plea set out the grant at large, which was of the 30th of *July* 1747, by which *Robert Stansfield*, in consideration of 42*s.* and of the covenants therein contained, granted to *J. Marshall, his heirs and assigns*, full liberty for him the said *J. M., his heirs and assigns*, to carry up a sough, &c. (stating the liberty to carry up the sough, and to make the two little sough-pits, one to be covered, &c. and the other to be kept open, &c. in the same terms as mentioned in the plea: and then follows what was omitted in the plea,) and also full liberty for *J. M., his heirs and assigns*, to *bring the rubbish* which may arise in another sough-pit made or intended to be made in *Marshall's* parcel of woody ground, and throw it into a hollow place in *Stansfield's* parcel of woody ground, for the rendering more safe and commodious the cart-way which is intended to be made by *J. M.* for the inhabitants of *Shipley* and others through his own ground there *to and from the* INTENDED COLLIERY; and also liberty for *J. M.*, his heirs and assigns, to get stones in *Stansfield's* parcel of woody ground, &c. (as in the plea mentioned.) Then followed covenants (omitted in the plea) that *J. M.*, his *heirs or assigns*, should not damage the trees growing in *Stansfield's* parcel of woody ground; nor get any of *Stansfield's* coals, but what should arise in the drift of the said intended sough; and that it should be lawful for *Stansfield, his heirs and assigns, from time to time and at all times after*, to go down into any pit or pits of *Marshall*, his heirs or assigns, for

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for the better discovering whether any coals of *Stansfield*'s, his heirs or assigns, should be gotten, save as aforesaid. And also that *Marshall, his heirs and assigns,* should not only repair such part of the fence or walls of *Stansfield,* his heirs or assigns, as should be injured by *Marshall,* his heirs or assigns, but should also from time to time and at all times make good, maintain, and secure that part of the fence or walling towards the banks, of the said brook where the said rubbish was intended to be laid. The replication then stated, that after *Marshall* had carried up
[617] the sough and made the two sough-pits, as in the plea mentioned, and before the said times when, &c. on 1st of *January* 1776, *it became and was no longer necessary to keep open either of the said sough-pits for the purpose of examining the said sough,* and thereupon *the said sough-pits* were afterwards and before the time when, &c. *respectively filled and covered up to the surface of the ground by and with the consent and approbation of the person then seised* of and in the said parcel of woody ground and the said other lands theretofore of *J. M.* with the appurtenances, and entitled to use and enjoy the said sough, &c., *and have not since been kept open.* To this there was a general demurrer and joinder.

Holroyd, in support of the demurrer, contended that the right of repairing the sough was incident to the grant of it; for that wherever a power was granted to one to make and use a thing in the soil of another, every thing necessary for the attainment and enjoyment of the grant passed also; and amongst others the liberty of entering on the grantor's soil for the purpose of repairing the thing: for which he cited at large 2 *Roll. Abr.* 567. *M. pl.* 1, 2, and 3, and 9 *Ed.* 4. 35. *b. Pomfret* v. *Ricroft,* 1 *Saund.* 323. and other cases there referred to; and *Shep. Touch.* 89. (*a*) And here he argued from the wording of the deed, the reason of the grant, and the relative situation of the lands of *Stansfield* and *Marshall,* that the grant of the privilege of using the sough, &c. was intended to enure so long as any coals remained to be gotten in any of *Marshall*'s grounds adjoining to or communicating with his parcel of woody
[618] ground, and was not merely confined to the privilege of using it for the getting of coals under his woody ground: for that there was a reference throughout to *Marshall*'s *heirs and assigns*

(*a*) Page 85. of edit. of 1784.

as

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as regulating their enjoyment of the privilege; which shewed that a continuing grant was intended. That it was not merely a grant to *him, his heirs and assigns, to do the act;* but a grant to him, *his heirs and assigns*, that he, *his heirs and assigns*, might do so. That the words of a deed were to be taken most strongly against the grantor; and the whole deed construed so as best to effectuate the intent of the parties at the time according to their several estates and interests. *Shep. Touch.* 87, 8. That the right of repairing the sough, incident to the general grant giving liberty to make and use it, was not restrained by the special leave granted to make the two sough-pits; for the use of those was afterwards qualified.

Wood, contrà, contended, first, that whatever incidents might follow a grant, which were absolutely necessary for the enjoyment of it; as in the instances mentioned in *Rolle*, where the grant is in general terms; yet it was competent to the owner of the land to limit the enjoyment of the grant by express provisions; and that here it was evident, by granting the liberty of making the sough, and the two little sough-pits which were to be closed after the present purpose was served, that the liberty was only meant to be granted once, to be used so long as the sough then made would serve the purpose, but not to be continued and renewed from time to time by making fresh sough-pits after the first were closed. For otherwise it was nugatory to grant special liberty to make two little sough-pits, one of which was for the special purpose of more easily making the sough, and which was to be covered in as soon as conveniently might be afterwards, and the other to be kept open so long only as was necessary for examining the sough, and no longer; if it had been intended that the grantee and his heirs might at all times make new sough-pits whenever it should be necessary. Secondly, he contended that the grant of the sough was to be confined to the liberty of getting coals from *Marshall's* woody ground; for it was to carry the sough up through *Stansfield's* ground *into* Marshall's *woody ground*, and not also into his adjoining lands: but the liberty claimed by the plea comprises both; which cannot be justified. If it had been intended to grant so large a liberty, which would be likely to endure for ever after, some general words would have been added. If there be a grant of a way to a particular close, it will not justify the

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user of it to go a close over and beyond the close mentioned. *Saunders* v. *Mose*, (*a*) *Howell* v. *King*, (*b*) &c. [Lord *Ellenborough* C. J. To be sure the way is to be measured by the use mentioned in the grant; but here the grant does not state that the sough is to be for the use or purpose of *Marshall*'s woody ground, but only that it is to be carried *into* that ground: and when he got the sough into his own ground he did not want any grant to carry it through his own ground.]

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment. After stating the pleadings as before set forth—

On the part of the defendant it has been contended, under the grant from *R. Stansfield* to *J. Marshall*, that he the defendant, as *Marshall*'s assignee, has a right to do every thing necessary to keep the sough in repair, as being incident to the grant of the sough; and, if necessary, to open sough-pits, and uncover the sough in the plaintiff's ground from time to time, as often as repairs of the sough shall be required. For the plaintiff it has been insisted, that the liberty of opening sough-pits was granted but *for once*, and not *as often* as the sough should require repairs. And, in addition to this question, another has been argued, viz. whether the defendant has, under the grant from *R. Stansfield*, any right to drain any land but that which was *J. Marshall*'s woody ground. The deed granting to *Jeremy Marshall* the liberty of making the sough does not in any part of it distinctly point out what particular purpose the sough which was to be made was intended to answer: but as it appears from the deed that *Stansfield* was to have liberty to go down into *J. Marshall*'s pits, to see that neither he nor any claiming under him, got any coal under the plaintiff's close, except in the drift of the sough; as there are coals under *Marshall*'s woody ground and the adjoining land; and as the deed speaks of an *intended colliery*; it seems that the object of the grant was to drain the water from such *intended colliery*, the local extent and limits of which intended colliery we have no means of defining: but judging from the

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(*a*) 1 *Roll. Abr.* 391.

(*b*) 1 *Mod.* 190. *Vid.* these and other cases collected in 4 *Vin. Abr.* 514.

nature

nature of such works, there seems no reason to give them any other or narrower limit than the boundaries of the continued property of the grantee, under which the intended colliery might be prosecuted by him, without regard to the closes and pieces of ground under which it might be carried, and who might of course be expected to follow the coal through all the contiguous and connected veins and seams of coal which belonged to him. The question therefore is singly, whether under the terms of the grant the grantee had a right to do that [621] which from time to time might be wanted to repair the sough, so long as the original purpose, for which it was made, required it to be continued: or, whether, the sough having been *once* made, it was the intention of the parties, that the grantee should use it no longer than it should happen to continue unimpaired by length of time or accidents; although in consequence of accidents the grantee might have actually lost the beneficial use of it very soon after it was made. Such latter construction, it is obvious, would but ill accord with the views of one who was about to open *a colliery intended to be worked as long as the coal might last*. As to the liberty of making two little sough-pits, which were to be kept open during a certain time, and then to be filled up, (and which has been observed upon in order to shew that the defendant could not open pits for the purpose of repairing the sough;) this does not furnish any substantial inference against the defendant. The purpose for which that liberty was granted was "*the more easy and safe carrying up the tail of the sough* and examining it." The purpose of carrying up the tail of the sough has long since been answered; and from the words, "the more easy and safe *carrying up the tail of the sough*," it may be reasonably concluded, that the sough might have been carried up, though not so easily and safely, without such pits; and if that be so, *Marshall*, under the words granting him the liberty to make the sough, would not have been entitled to make pits of that description: and therefore no inference arises from the mention of them that other pits should not be made, if the same should be, and to the extent only in which they should be, absolutely necessary for the purpose of repair. Nor do the covenants in the deed, [622] with respect to the repairs of the fences and other matters mentioned in them, furnish any argument to shew that *Marshall* and

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and his assigns had not, as incident to his grant, a right to do what might properly be necessary to repair the sough: for they are covenants by which he bound himself to do, for the benefit of the grantor, certain things which had no connexion with the continuance of the sough, and to do which he would have been under no obligation without such covenants. And it would be very illogical to deduce a conclusion from the terms of a deed comprehending covenants, without which one of the parties could not have certain rights, and from their not expressly granting matters, which would pass as incidents without being mentioned at all, that such matters in the nature of incidents were intended not to be granted. It is therefore to be seen, as there is nothing to narrow the grant, whether the right to repair the sough, and of doing all necessary things for that purpose, do not pass as an incident to the grant of the liberty of making it. As to which the authorities quoted by Mr. *Holroyd* are very strong, and that cited from 2 *Roll. Abr.* 567. is very like the present case. It appears from the year-book, 9 *E.* 435. thus—*Choke*, in the course of an argument at the bar, put this case: "If a man grant to me to dig in his land, "and make a trench from such a fountain or spring to my "place, so that I may put a pipe to carry the water to my "place; if the pipe be afterwards stopped or broken, so that "the water cannot issue out, I cannot dig the land to amend "the pipe; for that was not granted to me: but if he had "granted that I might dig and amend the pipe toties quoties, [623] "&c., then I should do it. And the law is the same if I "prescribe to have such a conduit; it behoveth me to prescribe "to scour and amend it, toties quoties, &c. or otherwise I "cannot dig the land to empty it, &c. *Quod fuit negatum* "in both the cases; for it was said by the Court, that *it is* "*incident to such a grant to scour and amend.*" The authority of this and the other cases was not disputed; but the case found in *Rolle's Abr.* and the year-book was said to be distinguishable from that now before us, as that was a *continuing* grant, to convey water at all times. Yet it was conceded in argument, if the sough had been to drain the water from *all the grantee's coals*, that he would have had a right to maintain the sough while there were any coals: and if that be so, as it is admitted by the pleadings, that *all* the coals *are not gotten from within* and under

under *Marshall*'s woody grounds and the adjoining lands, which may be deemed the *intended colliery;* upon the grounds already considered the right to maintain the sough will of course continue. For these reasons we are of opinion that judgment should be for the defendant.

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Judgment for the Defendant.

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LLOYD *against* HOOPER.

Wednesday, June 25th.

A RULE was obtained for the Plaintiff to shew cause why the writ of inquiry executed and all subsequent proceedings should not be set aside for irregularity. The question turned upon whether the Defendant had received proper notice for executing the writ of inquiry? The venue was laid in *Middlesex*, and the defendant, whose general residence was at *Abergavenny* in *Monmouthshire*, and who was residing there when the first writ was sued out, was afterwards arrested at a hotel in *Piccadilly*, where he had been staying for near a month before: and upon the declaration being filed, he had four days' notice to plead, which was served at the hotel, as were other intervening notices between that and the notice in question, without objection made. At length, interlocutory judgment having been obtained, notice was given on the 7th of *June* for executing the writ of inquiry on the 16th; and it was not till the 14th that the want of proper notice was objected to; the defendant being seen at the same hotel on the 7th and 16th of *June*.

One who was residing at a hotel in town, from the time of his arrest till he was served with notice of executing the writ of an inquiry, was holden not entitled to more than eight days' notice in a town cause, though his general residence (his home) was above 40 miles from town.

Park shewed cause; and referring to the stat. 14 *Geo.* 2. *c.* 17., which provides that no cause shall be tried at the Sittings in *London*, &c. or *Westminster*, &c. *where the defendant resides above* 40 *miles* from the same, unless at least ten days' notice of trial be given; (which by the practice of the Court in these cases is 14 days;) said that this had always been understood of a bonâ fide residence of the party in the country during the proceedings: though he admitted, according to *Brind* v. *Torris*, (*a*) that a casual residence of the party in town where he was arrested, and the laying the venue there, would not take away his right to the longer notice in the subsequent stages of

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(*a*) 2 *Blac.* 1205.

proceeding,

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proceeding when he was bonâ fide residing above 40 miles off. But here he resided all the time in town.

Comyn, contrà, said that the defendant's residence in town during these proceedings was merely casual, his only home being at *Abergavenny*, where he was when the writ was first sued out, and to which he was about to return: and that the statute, requiring the longer notice to be given where the party *resides* above 40 miles from town, must be understood of his place of *general* residence, his home, and not of an accidental residence as a guest at a hotel. That this seemed to be the only certain criterion for giving notice, and was to be collected from the cases of *Brind* v. *Torris*, *Kutiff* v. *Gascoigne*, cited in *Douglas* v. *Ray*, (*a*) and *Spencer* v. *Smith*. (*b*)

The Court were clearly of opinion that the defendant, though his general residence might be at *Abergavenny*, yet having resided in *London*, for aught appeared, from the time of his arrest till after he was served with the notice of executing the writ of inquiry, was only entitled, as one living in town, to the eight days' notice, which had been given. That the object of the statute in requiring the longer notice to be given to defendants residing above 40 miles from town was to secure to them the
[626] full benefit of the notice for eight days, part of which time would necessarily be consumed in its reaching him in the country, and in giving him time to communicate upon it with his agent in town: but here the defendant continued domiciled in *London* at the time of the notice served, which distinguished this from the case referred to.

Rule discharged.

(*a*) 4 *Term Rep.* 553. (*b*) 1 *East*, 668.

END OF TRINITY TERM.

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INDEX

TO

THE PRINCIPAL MATTERS.

ABATEMENT.

AS by the practice of the Court they will not grant oyer of an original writ, and yet a plea in abatement for want of an addition to the defendant in such writ is bad without oyer; the effect is to prevent such a plea from being pleaded; and therefore if pleaded the Court will quash it. *Desbons* v. *Head*, *E.* 46 G. 3. 383

ACCORD AND SATISFACTION.

See BAIL-BOND, No. 1.

ACTION, COMMENCEMENT OF.

Where the debt was paid after an alias pluries writ issued, the defendant cannot object at the trial that the latitat was not returned; for at any rate if the alias pluries were the commencement of the action, it is only an irregularity, which, though a ground for application to the Court to set aside the proceedings, yet having been once waved, cannot afterwards be objected to. Neither can it be objected at the trial that when the debt was paid the defendant had no notice of any action commenced or costs incurred. *Toms* v. *Powell*, *T.* 46 G. 3. 536

ACTION ON THE CASE.

1. Under ancient deeds recognizing a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brush-wood, through which it is possible for the fish to escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of an escape through the weir is debarred; though in flood times the fish may still overleap it. The enhancing, straitening, or enlarging of an ancient weir, as well as the new erection of one, for the purpose of stopping fish in their passage up a river, is treated as a public nuisance by *Magna Charta*, *c.* 23. and 12 *Ed.* 4. *c.* 7. And the right to convert a brushwood into a stone weir is not evidenced by shewing that 40 years ago two-thirds of it had been so converted, without interruption: and the action for the injury having been brought within 20 years after the remaining third part was so converted. *Weld* v. *Hornby*, *Clerk*, *H.* 46 G. 3. 195.
2. After a warranty of a horse as sound the vendor in a subsequent conversation said, that *if the horse were unsound* (which he denied) *he would take it again and return the money.* This is no abandonment of the original contract,

contract, which still remains open; and though the horse be unsound the vendee must sue upon the warranty, and cannot maintain assumpsit for money had and received to recover back the price, after a tender of the horse. *Payne* v. *Whale, H.* 46 G. 3. 274

3. A canal act provided that the Canal Company should not be entitled, on purchasing lands for making a canal, to any coal mines, &c. under the same; but that such mines should belong to the same persons as would have been entitled to them if the act had not been made: but it required the owners to give notice to the company of their intention to work their mines within ten yards of the canal; and that the Company might inspect the mines, and might stop the further working of them, paying compensation to the owners: held that the right of the owners to work within the ten yards was left as before the act, if after notice given by them to the Company the latter did not purchase out their rights; and that the canal being damaged by the nearer approach of the mine after such notice and non-purchase, no action lay against the coal-owner for such injury, which happened by the default of the Company in not purchasing. *The Company of Proprietors of the Wyrley and Essington Canal Navigation* v. *Bradley & others, E.* 46 G. 3. 368

4. Aliter, where the canal act provided that in working such mines no injury should be done to the canal. *Birmingham Canal Company* v. *Hawesford*, cited. *ib.*

5. And aliter, where the house of one claiming under a grant from the owner of the soil was undermined by him. *Earl of Lonsdale's case*, cited. *ib.*

ADMINISTRATOR AND EXECUTOR.

An executor administering, having once received money, assets of his testator, cannot discharge himself under the plea of plene administravit to an action by a bond creditor of his testator, by shewing that he paid the money over to his co-executor, even for the purpose of satisfying the bond creditor, who had applied for payment to such co-executor, if the co-executor afterwards misapplied the money by retaining it to satisfy his own simple contract debt. *Crosse et Uxor, Administrators of Reeder*, v. *Smith and Munt, Executors of Grierson, H.* 46 G. 3. 246

AFFIDAVIT TO HOLD TO BAIL.

1. An affidavit to hold to bail, stating that the defendant was "justly indebted to the plaintiff in 100*l.* upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid," is sufficient, without stating in what character the bill was due to the plaintiff, whether as payee or indorsee. *Bradshaw* v. *Saddington, M.* 46 G. 3. 94

2. An affidavit to hold to bail, only stating that the defendant was "*indebted* to the plaintiff in 54*l. for goods sold and delivered* (not stating *by the plaintiff to the defendant*) and as the acceptor of a bill of exchange," is insufficient. *Perks* v. *Severn, H.* 46 G. 3. 194

ANNUITY.

The annuity act, 17 *Geo.* 3. *c.* 26. as appears from the whole purview of it, is confined throughout to annuities granted upon *pecuniary* consideration; though the first clause, in the terms of it, requires a memorial of every annuity bond, &c. to be inrolled. It is not enough, therefore, for the defendant to plead generally to an action on a bond conditioned for the payment of an annuity, the consideration whereof does not appear upon the face of the bond or condition set forth upon over, that it was sealed and delivered *after* the passing of the act, and that *no memorial* of it was inrolled; without shewing that the consideration was *pecuniary*: but such general plea is bad on demurrer. *Horn, Executrix of Horn*, v. *Horn and another, T.* 46 G. 3. 529

APPEAL,

APPEAL.

The justices are bound by stat. 9 G. 1. *c.* 7. *s.* 8. to receive and adjourn an appeal made by the next Sessions after an order of removal made against such order, if no notice has been given to the respondent; though they should be of opinion that the order was executed in sufficient time before the Sessions to have enabled the appellants to give reasonable notice of their appeal to the respondents. *The King* v. *the Justices of Staffordshire*, T. 46 G. 3. 549

APPRENTICE.

See SETTLEMENT BY APPRENTICESHIP. STAMP, No. 1.

Where, upon a habeas corpus to bring up the body of an apprentice, the keeper of the House of Correction returned, with the body of the party, a regular conviction of him by two magistrates on the stat. 20 *Geo.* 2. *c.* 19. for a misdemeanor in absenting himself as an apprentice from his master's service; it is no answer to shew by affidavit that the party had bound himself *when an infant* to serve till 25, and that when he came of age he elected to avoid the indentures, after which the offence imputed had been committed; for this was proper matter to be shewn to the magistrates below, who, if the matter shewn to them were true, acted at their own peril in committing the party; but this Court have no power to discharge an apprentice from his indentures; and are bound by the return of a regular conviction, where the objection does not appear on the face of the return, to remand the party. *Ex parte Gill*, E. 46 G. 3. 370

ASSUMPSIT.

1. A creditor for goods sold and delivered to a trader who had committed a secret act of bankruptcy, not being cognizant thereof, attached money of the trader's in the hands of a third person, and recovered judgment in the mayor's court of *London* against the garnishee, who thereupon paid him the amount of the debt so attached; afterwards a commission issued: held, that this payment was not protected by the stat. 19 G. 2. *c.* 32. not being a payment made by the bankrupt in the usual and ordinary course of trade and dealing; and held that the assignees of such bankrupt, under a third commission issued against him, might sue for and recover back such payment, although the bankrupt who had obtained his certificate under his former commissions, had not paid 15*s.* in the pound under the second of them: in which case his future effects remain liable to that extent to his creditors under the second commission respectively. *Hovil & others, Assignees, &c. of Wardell, a Bankrupt*, v. *Browning*, H. 46 G. 3. 154

2. A trader indebted to the defendants, after a secret act of bankruptcy, gives them a new bill in lieu of their former claim, and deposits with them certain policies of insurance made on his account, as collateral security. And after notice of a loss upon those policies, the policy broker at the bankrupt's request, gives his own acceptance to the defendants (which was afterwards paid,) in order to induce them to give up their lien on the policies; after which a commission of bankrupt having issued against the trader on the prior act of bankruptcy: held, that the assignees could not recover from the defendants the amount of the broker's acceptance paid to them, which was *the money of the broker*, and *not of the bankrupt*; though the broker, in settling his account with the assignees, retained the amount of the money so paid by him to the defendants, in order to get the policies out of their hands. *Hovil & others, Assignees of Wardell, a Bankrupt*, v. *Pack and another*, H. 46 G. 3. 164

3. After a warranty of a horse as sound the vendor in a subsequent conversation said, that *if the horse were unsound* (which he denied) *he would take it again and return the money*. This is no abandonment of the original contract,

which still remains open : and though the horse be unsound the vendee must sue upon the warranty, and cannot maintain assumpsit for money had and received to recover back the price, after a tender of the horse. *Payne* v. *Whale, H.* 46 G. 3. 274

4. A premium paid on an illegal insurance, though not in fact known to the parties to be so, cannot be recovered back. *Lubbock* v. *Potts, T.* 46 G. 3. 449

5. Where the plaintiff declares upon a quantum meruit for work and labour done, and materials found, it is competent to the defendant, even without notice to the plaintiff, to prove that the work done was not worth so much as the plaintiff claims. And if it appear that the plaintiff had been paid on account as much as the work was worth, he cannot recover. And so it seems that the defendant may be let into such a defence where the contract was for the work to be done at a certain price ; at least if he give the plaintiff previous notice of such defence, that he may be prepared to meet it. And, quære, if the work done be wholly inadequate to answer the purpose for which it was undertaken to be performed, whether the defendant may not be let into such defence even without notice. *Basten* v. *Butter, T.* 46 G. 3. 479

ATTORNEY.

1. Attornies, *plaintiffs*, are not within the *London* court of conscience act 39 & 40 G. 3. *c.* 104. compellable to sue there for a debt under 5*l.* at the peril of costs. *Board* v. *Parker, M.* 46 G. 3. 47

2. And this, though the defendant were also an attorney. *M.* 46 G. 3. 50

3. An attorney is bound to disclose, when called as a witness by the adverse party, the contents of a notice which he received to produce a paper in the hands of his client ; the privilege of the client only extending to exclude the disclosure of any fact communicated confidentially to the witness in the character of his attorney. *Spencely, qui tam,* v. *Schulenburgh, E.* 46 G. 3. 357

AWARD.

1. Upon a reference of all actions, controversies, &c. and also of two distinct matters of difference ; if the arbitrator omit to decide one of such distinct matters, that vitiates the whole award ; which cannot therefore be enforced by attachment. *Randall* v. *Randall, M.* 46 G. 3. 81

2. Where parties by bond agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of court, it is competent to either, even since the stat. 9 & 10 *W.* 3. *c.* 15. to revoke by deed his submission, and notify the same to the arbitrators before the authority be executed : and he cannot be attached for a contempt of court if after such revocation and notice the arbitrators make an award, and the submission be made a rule of court. But it seems that it would be a contempt to revoke the submission after it had been made a rule of court. *Milne and others, Assignees of Rhodes and another, bankrupts,* v. *Gratrix T.* 46 G. 3. 608

BAIL.

See AFFIDAVIT TO HOLD TO BAIL.

1. The defendant, a seaman, being out upon bail on process for a debt under 20*l.*, was impressed into the king's service ; and as he would have been entitled to his discharge, if in custody, by virtue of the stat. 32 G. 3. *c.* 33. *s.* 22., the Court on application of the bail ordered an exoneretur to be entered on the bail-piece in the first instance. *Robertson* v. *Patterson, T.* 46 G. 3. 405

2. Bail in error, who were excepted to and did not justify, were relieved from proceedings against them, though no other bail had been put in ; but they were made to pay the costs up to this time, the plaintiff having been induced by former cases to proceed against them. *Gould & another* v. *Holmstrom, T.* 46 G. 3. 580

3. After default made in not putting in special bail in time, it is not enough that bail are afterwards *put in* : but the plaintiff

plaintiff may take an assignment of the bail-bond and proceed thereon, unless the bail be also *justified*, though not before excepted to. *Turner* v. *Carey, and others, T.* 46 G. 3. 607

BAIL-BOND.

To debt on a bail-bond, it is no good plea that the action was brought by the sheriff for the benefit of and as trustee for the sheriff's officer, who arrested the defendant, and to whom the defendant paid the debt and costs, &c. after the return-day, but *before the sheriff was ruled to return the writ*, and who accepted the money so paid by the defendant, *in full satisfaction and discharge of the bail-bond and fees*, &c.; and that if any damage were afterwards incurred for default of defendant's appearance according to the condition of the bond, it was occasioned by the default of such sheriff's officer in not paying over the debt and costs to the plaintiff in the original action, which would have been accepted by such plaintiff, &c.: for it does not thereby appear that the sheriff's officer had either a *legal* or an *equitable* interest (even supposing the latter would have sufficed) in the bond *at the time of the supposed satisfaction* received by such officer; and supposing that accord and satisfaction could be pleaded to such a bond, not for *money* but for a *collateral* act; and supposing that it could be so pleaded *after* the day stipulated for performance of the act. *Scholey and Domville* v. *Mearns, H.* 46 G. 3. 148

BANKRUPT.

See Insolvent Debtors, No. 2.

Mandamus, No. 1.

1. It is a good plea to an action on a promissory note and for money lent, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay to them the money claimed by the plaintiff: and it is no good replication that the causes of action accrued after the plaintiff became bankrupt, and that the defendant treated with the plaintiff as a person capable of receiving credit in those behalves; and that the commissioners had made no new assignment of the said notes and money; for the general assignment of the commissioners passes to the assignees of the bankrupt all his *after* acquired as well as present personal property and debts. *Kitchen* v. *Bartsch, M.* 46 G. 3. 53

2. A bill of sale to a particular creditor of *all* the effects of a trader, in trust to satisfy his debt, and pay over the surplus (if any) to the trader, is an act of bankruptcy, and of no effect as a conveyance notwithstanding it was given by the trader *when under arrest at the suit of the particular creditor* for a just debt, and followed by an immediate change of possession. There was another writ out against the trader at the time, and he knew that he was in insolvent circumstances; but it did not appear that these facts were known to the particular creditor. *Newton, Assignee of Stelfox, a Bankrupt,* v. *Chantler, H.* 46 G. 3. 138

3. A creditor for goods sold and delivered to a trader, who had committed a secret act of bankruptcy, not being cognizant thereof, attached money of the trader's in the hands of a third person, and recovered judgment in the mayor's court of *London* against the garnishee, who thereupon *paid* him the amount of the debt so attached; and afterwards a commission issued: held that this payment was not protected by the stat. 19 G. 2. c. 32., not being a payment made *by the bankrupt* in the usual and ordinary course of trade and dealing: and held that the assignees of such bankrupt, under a *third* commission issued against him, might sue for and recover back such payment, altho' the bankrupt who had obtained his certificate under his former commissions, had not paid 15*s.* in the pound under the second of them: in which case his future effects remain liable to that extent to his creditors under the second commission respectively. *Hovil and others,*

others, Assignees of Wardell, a Bankrupt, v. *Browning*, H. 46. G. 3. 154

4. A trader indebted to the defendants, after a secret act of bankruptcy, gives them a new bill in lieu of their former claim, and deposits with them certain policies of insurance made on his account as collateral security. And after notice of a loss upon those policies, the policy broker, at the bankrupt's request, gives his own acceptance to the defendants (which was afterwards paid,) in order to induce them to give up their lien on the policies; after which a commission of bankrupt having issued against the trader on the prior act of bankruptcy: held, that the assignees could not recover from the defendants the amount of the broker's acceptance paid to them, which was the money of the broker, and not of the bankrupt; though the broker, in settling his account with the assignees, retained the amount of the money so paid by him to the defendants, in order to get the policies out of their hands. *Hovil & others, Assignees of Wardell, a Bankrupt*, v. *Pack and another*, H. 46 G. 3. 164

5. Where assignees of a bankrupt advertised the lease of certain premises, of which the bankrupt was lessee, for sale by auction, (without stating themselves to be the owners or possessed thereof,) and no bidder offering, they never took possession in fact of the premises: held that this was no more than an experiment to ascertain the value, whether the lease were beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term, nor support an averment in a declaration in covenant against them by the landlord, that all the estate, right, title, interest, &c. of the bankrupt in the premises came *to the defendants by assignment thereof. Turner* v. *Richardson and another, Assignees of Barber, a Bankrupt*, E. 46 G. 3. 345

6. But in an action for use and occupation brought against the assignee of a bankrupt to whom a house was let, proof that the landlord had applied to the assignee after the bankruptcy to know if he meant to take the bankrupt's interest in the house; to which the assignee answered, that if he did not let it by *Ladyday* he would give it up; and he afterwards accordingly paid up the rent to that day, and offered the key, Lord *Kenyon*, C. J. held him liable. *Boome* v. *Robinson, Westminster, Dec.* 1800. 339

7. The drawer of a bill of exchange, which had been accepted, and was not refused payment by the acceptor till after the bankruptcy of the drawer, is discharged by his certificate, inasmuch as such debt is made proveable under his commission by the stat. 7. G. 1. c. 31. *Starey* v. *Barnes*, T. 46 G. 3. 435

8. A devisee for life of an estate, part of which was a brick ground, making bricks there for sale generally, with a view to profit, is not a trader within the bankrupt laws, though he purchased the coals and some of the wood used in burning the bricks, and had occupied the same ground as a brickmaker for general sale before the estate came to him by devise; for this is but a more beneficial mode of enjoying his own estate, by carrying the soil to market in an ameliorated state; and it is not a buying of any commodity, to sell it again, nor does it fall within the principle of the bankrupt laws which were levelled against those who getting other men's goods into their hands obtain credit upon and consume the same. *Sutton* v. *Wheeley*, T. 46 G. 3. 442

9. Where a trader, being pressed by a creditor for payment or security, one or other of which he said he would have, gave a bill of sale of certain wools and cloths in a mill, apparently the whole of his stock, and immediately left his business and home, and became a bankrupt; this, inasmuch as the act done did not redeem the trader even from any present difficulty, which is the ordinary motive for such an act when really done under the pressure of a threat, is evidence that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor in contemplation of bank-

rupt;

ruptcy; and is therefore void as against the assignees of the bankrupt. *Thornton and others, Assignees of Rangdale, a Bankrupt*, v. *Hargreaves and another*, T. 46 G. 3. 54

BARON AND FEME.

The Court will discharge a married woman on filing common bail, who was sued for goods sold and delivered to her by the plaintiff; knowing at the time that she was a married woman, though living apart from her husband with a separate maintenance. *Wardell* v. *Gooch*, T. 46 G. 3. 582

BASTARD.

The Court will grant a habeas corpus to bring up the body of a bastard child, within the age of nurture, for the purpose of restoring it to the custody of the mother, from whose quiet possession it was taken, at one time by fraud, and afterwards by force; and this without prejudice to the question of guardianship, which belongs to the Lord Chancellor representing the king in Chancery. *The King* v. *Hopkins and Wife*, T. 46 G. 3. 579

BILLS OF EXCHANGE, &c.

1. A., B., and C., trading under the firm of A. and B., in the *cotton* business; C. not being known to the world as a partner; and A. and B. traded as partners alone under the same firm in the business of *grocers*; in which latter business they became indebted to D. and gave him their acceptance; which not being able to take up when due, they, in order to provide for it, indorsed in the common firm of A. and B. a bill of exchange to D. which they had received in the *cotton* business in which C. was interested; but such indorsement was unknown to C., of whom D. the indorsee had no knowledge at the time. Held that such indorsement in the firm common to both partnerships of a bill received by A. and B. in the *cotton* business bound C. their secret partner in that business, and that consequently C. was liable to be sued by D. on such indorsement; the latter not knowing of the misapplication of the partnership fund at the time. *Swan and others* v. *Steele, Clerk, and Wood*, H. 46 G. 3. 210
2. An indorsee, three months after a bill became due, demanded payment of the indorser, who first *promised to pay it if he would call again with the account*, and afterwards said that *he had not had regular notice, but as the debt was justly due he would pay it*: held that the first conversation being an absolute promise to pay the bill, was prima facie an admission that the bill had been *presented* to the acceptor for payment *in due time*, and had been *dishonoured*, and that *due notice* had been given of it to the indorsee; and superseded the necessity of other proof to satisfy those averments in the declaration; and that the second conversation only limited the inference from the former so far as the want of regular notice of the dishonour to the defendant went; which objection he waved. *Lundie* v. *Robertson*, H. 46 G. 3. 231
3. If an indorser neglect to demand payment of the drawer in a convenient time, a subsequent promise to pay by the indorser will cure this laches. By Lord *Raymond*, C. J. *Haddock* v. *Bury, Middlesex*, T. 3. G. 2. MS. 236
4. It seems that proof of a protest for non-acceptance of a foreign bill of exchange is necessary to enable the payee to recover against the drawer; and that the want of it is not supplied by proof of a noting for non-acceptance and a subsequent protest for non-payment. But whether or not the protest for non-payment be sufficient in such case, where the holder, after a refusal by the drawee to accept, presented it for payment when due, and was refused payment; at any rate the holder is bound to give notice to the drawer of the non-acceptance; without which the original payee, to whom the bill was returned, cannot recover against the drawer: and it is no excuse for not giving such notice that the drawer had no effects in the drawee's hands

at

at the time when the bill was refused acceptance or afterwards, if he had some effects (to whatever amount in the drawee's hands when the bill was drawn.) *Orr and others* v. *Maginnis*, *E.* 46 G. 3. 359

5. Whether or not the fact of putting a letter into the post-office containing notice of the dishonour of a bill to the drawer, to whom it was directed, be of itself sufficient evidence to be left to the jury that such notice reached the drawer; at any rate, if a bill be accepted payable at *A.*'s, who is the acceptor's banker, the party taking such special acceptance (which he is not bound to do) thereby impliedly agrees to present it for payment within the usual banking hours at the place where it is made payable; and if he present it after such hours, without effect, it is no evidence of the dishonour of the bill so as to charge the drawer. *Parker* v. *Gordon*, *E.* 46 G. 3. 385

6. The drawer of a bill of exchange which had been accepted, and was not refused payment by the acceptor till after the bankruptcy of the drawer, is discharged by his certificate; inasmuch as such debt is made proveable under his commission by the stat. 7 G. 1. c. 31. *Starey* v. *Barnes*, *T.* 46 G. 3. 435

BILL OF SALE—*fraudulent.*

See BANKRUPT, No. 2.

BRICKMAKER,

See BANKRUPT, No. 8.

BRIDGE.

By the common law, declared and defined by the stat. 22 *H.* 8. *c.* 5. and subsequent acts, where the inhabitants of a county are liable to the repair of a public bridge, they are liable also to repair to the extent of 300 feet of the highway at each end of the bridge; and if indicted for the non-repair thereof, they can only exonerate themselves by pleading specially that some other is bound by prescription or tenure to repair the same. *The King* v. *The Inhabitants of the West Riding of the County of York*, *T.* 46 G. 3. 588

BROKER.

See ASSUMPSIT, No. 2.

1. Where a broker pledges the goods of his principal as his own, the pawnee who claims by such tortious act of the broker cannot claim to retain against the principal in trover for the amount of the lien which the broker had on the goods for his general balance at the time of such pledge. It may be otherwise, where one who has a lien delivers the goods to a third person as a security, with notice of his lien, and appoints him to continue his possession, as his servant, for the preservation of his lien. *M'Combie* v. *Davies*, *M.* 46 G. 3. 5

2. It seems that a *stock-broker* is liable to pay to the Chamberlain of *London*, for the benefit of the corporation, the annual duty of 40*s.* directed by stat. 6 *Ann. c.* 16. *s.* 4. to be received by the Chamberlain from every broker. But at all events if the Chamberlain sue for such duty in the *London* Court of Requests, and that Court decline taking cognizance of the suit, on the ground that the corporation, for whose benefit the duty was to be received, had taken a bond in the penal sum of 10*l.* (the Court having jurisdiction only to the extent of 5*l.*) from the broker, upon which he might be sued in the superior courts, and that the Judges of the Court of Requests were freemen of the corporation interested in the suit; this Court will grant a mandamus to the commissioners to proceed therein; for under the stat. of *Anne* their Chamberlain is *a trustee* for the corporation; and a bond taken by them in their own name for securing the 40*s.* duty is no merger of the ordinary remedy given to their chamberlain by the legislature: neither is the right of the Chamberlain to sue in the Court of Requests, which has always been the practice, affected by the scintilla of interest which any of the commissioners

commissioners might be supposed to have as corporators in the duty to be recovered; though it did not appear that *all* of them had such interest. *The King* v. *The Commissioners of the London Court of Requests.* *H.* 46 G. 3. 292

BURGLAR—*conviction of,*

See CERTIFICATE TO EXEMPT, &c.

CANAL.

1. A canal act provided that the Canal Company should not be entitled, on purchasing lands for making a canal, to any coal mines, &c. under the same; but that such mines should belong to the same persons as would have been entitled to them if the act had not been made: but it required the owners to give notice to the Company of their intention to work their mines within ten yards of the canal; and that the Company might inspect the mines, and might stop the further working of them, paying compensation to the owners: held that the right of the owners to work within the ten yards was left as before the act, if, after notice given by them to the Company, the latter did not purchase out their rights; and that the canal being damaged by the nearer approach of the mine, after such notice and non-purchase, no action lay against the coal-owners for such injury, which happened by the default of the Company in not purchasing. *The Company of Proprietors of the Wyrley and Essington Canal Navigation* v. *Bradley and others,* *E.* 46 G. 3. 368
2. Aliter, where the canal act provided that in working the mines no injury should be done to the canal. *Birmingham Canal Company* v. *Hawkesford,* cited. *ib.*
3. And aliter, where the house of one claiming under a grant from the owner of the soil was undermined by him. *The Earl of Lonsdale's case,* cited. *ib.*

CARRIER.

Where no lien exists at common law, it can only arise by contract with the particular party, either express or implied: it may be implied either from previous dealings between the same parties upon the footing of such a lien, or even from a usage of the trade so general as that the jury must reasonably presume that the parties knew of and adopted it in their dealing. But where, as in the case of a common carrier claiming a lien for his general balance, such a lien is against the policy of the common law and the custom of the realm, which only gives him a lien for the carriage price of the particular goods, there ought to be very strong evidence of a general usage for such a lien, to induce a jury to infer the knowledge and adoption of it by the particular parties in their contract: and the jury having negatived such a general usage, though proved to have been frequently exercised by the defendants and various other common carriers throughout the North for 10 or 12 years before, and in one instance so far back as 30 years, and not opposed by other evidence the Court refused to grant a new trial. *Rushforth and others, Assignees of Rushforth,* v. *Hadfield and others,* *H.* 46 G. 3. 224

CERTIFICATE TO EXEMPT FROM PARISH OFFICES.

A certificate granted by a Judge at the assizes, upon the apprehension and conviction of a burglar, exempting the prosecutor and his assignees from "all and all manner of *parish* and ward offices," exempts the party from serving the office of *petty constable* for a township within, but not co-extensive with, the parish where the felony was committed, and for which the certificate was granted; to which office he was appointed at the court leet of the manor co-extensive with such township. *Mosely, Bart.* v. *Stonehouse,* *H.* 46 G. 3. 174

CHAPLAIN.

See CURATE.

CHURCH-

CHURCHWARDEN,

See ELECTION, No. 1.

COAL MINE,

See GRANT.

1. A canal act provided that the Canal Company should not be entitled, on purchasing lands for making a canal, to any coal-mines, &c. under the same, but that such mines should belong to the same person as would have been entitled to them if the act had not been made: but it required the owners to give notice to the Company of their intention to work their mines within ten yards of the canal; and that the Company might inspect the mines, and might stop the further working of them, paying compensation to the owners: held, that the right of the owners to work within the ten yards was left as before the act, if after notice given by them to the Company the latter did not purchase out their rights: and that the canal being damaged by the nearer approach of the mine after such notice and non-purchase, no action lay against the coal-owner for such injury, which happened by the default of the company in not purchasing. *The Company of Proprietors of the Wyrley and Essington Canal Navigation* v. *Bradley and others, E.* 46 G. 3. 368
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3. And aliter, where the house of one claiming under a grant from the owner of the soil was undermined. *Earl of Lonsdale's case*, cited. *ib.*

COLONIAL PRODUCE.

Colonial produce cannot legally be shipped from the *British West Indies* for *Gibraltar*, and therefore the same cannot be insured on such a voyage. And it matters not that part of the cargo was shipped at one of the *West India* islands, with liberty to exchange it at another (which would have been legal,) if in fact it were not exchanged, and its ultimate destination was *Gibraltar*. *Lubbock* v. *Potts, T.* 46 G. 3. 449

COMMITMENT—BY PAROL.

The stat. 13 G. 3. *c.* 80, gives a penalty in case of killing game on a *Sunday*, and directs that it shall be forthwith paid on conviction, and that in case of neglect or refusal to pay, or give security for the payment of it, the justice shall by warrant under his hand and seal cause the same to be levied by distress and sale of the offender's goods; and that it shall be lawful for such justice to order such offender to be detained in custody until return may conveniently be made to such warrant of distress, unless the party convicted shall give security for his appearance, &c. Held that such order to detain in custody until the return of the warrant of distress may be by parol. *Still* v. *Walls and Harris, T.* 46 G. 3. 533

COMMON.

1. A custom that all the customary tenants of a manor *having gardens, parcels* of their customary tenements respectively, have immemorially by themselves, their tenants and occupiers, dug, taken, and carried away from a waste within the manor, to be used upon their said customary tenements, *for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively, for the* IMPROVEMENT *thereof, such turf covered with grass, fit for the pasture of cattle, as hath been fit and proper to be so used,* at *all* times of the year, *as often, and in such quantity as occasion hath required*, is bad in law, as being indefinite and uncertain, and destructive of the common: and so is a similar custom for taking and applying such turf *for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences* of such customary tenements. *Wilson* v. *Willes, Ex. H.* 46 G. 3. 121

2. The

2. The owner of a tenement may have two distinct rights of common for his cattle levant and couchant upon such tenement, upon different wastes, in different manors, under several lords; and therefore an allotment under one inclosure act in lieu of his right of common upon one of such wastes, will not do away or lessen his claim for an equal allotment with other commoners, under a subsequent act for inclosing the other waste. Semble aliter; if the different wastes had appeared to have been originally holden under the same lord. *Hollingshead* v. *Walton*, *T.* 46 *G.* 3. 485

CONSCIENCE, COURT OF,

See LONDON COURT OF CONSCIENCE.

CONSTABLE.

A certificate granted by the Judge at the assizes, upon the apprehension and conviction of a burglar, exempting the prosecutor and his assignee from "all and all manner of *parish* and ward offices," exempts the party from serving the office of *petty constable* for a township within, but not co-extensive with, the parish where the felony was committed, and for which the certificate was granted; to which office he was appointed at the court-leet of the manor co-extensive with such township. *Mosely, Bart.* v. *Stonehouse*, *H.* 46 *G.* 3. 174

CONVICTION.

1. Where a penalty is to be sued for before justices of peace within a certain time after the offence committed, upon a conviction for such offence returned by certiorari into *B. R.*, it ought to appear on the face of the evidence stated in such conviction, that the prosecution was in time; and if the witness be only stated to have mentioned *the month* in which the offence was committed, *omitting the year*, and there be no word of reference to connect it with the true date, the omission cannot be supplied either by reference to the offence charged in the information, or by presumption arising from the justices having committed the defendant. *Rex* v. *Woodcock*, *H.* 46 *G.* 3. 146

2. A conviction on the malt-act, 42 *G.* 3. *c.* 38. *s.* 30. dated 4th of *June* 1805, stated that on the 29th of *May* 1805, *R. P.* informeth us (three justices) that at the time of the committing the offence after mentioned the defendant was a maltster, and *within three months now last past*, viz. on 12th *of* May *now last past*, at *W.* &c. did wet certain *grain* of him the defendant, then and there *making into malt* in a certain *stage of operation*, &c. and thereupon *afterwards on the 4th of* June, (no year mentioned) at *W.* the defendant having been duly summoned, *now here appears* before us, &c. and having heard the information read, *is* asked, &c. and thereupon the defendant *denieth*, &c.; whereupon we do *now here* proceed to examine, &c.; and *on the day and year last aforesaid* at *W.* &c. *J. F.* officer of excise, *now here comes* before us, &c. and *deposeth*, &c. *in the premises*, that he *surveyed the malt-house of the defendant* at *W.* aforesaid, on *the said* 12*th of* May, and found *a floor of malt in operation*, very wet, &c. and the defendant *is now here* again called upon by us, &c. for his further defence, but no other evidence *is now here* produced, &c., *whereupon* it is adjudged, &c. (Stated to be signed and sealed on this 4th of *June* 1805.) Held.

1st, That the offence being charged to be committed on the 12th of *May now last past*, the antecedent date being the 29th of *May* 1805, when the information was exhibited, and the conviction being dated the 4th of *June* 1805, and it being also alleged that *the offence* was committed *within three months now last past*; it does appear that the offence was committed on the 12th of *May* 1805, and not in 1804. The words *now last past*, after the 12th of *May*, referring to the *day* of the month, and not to the *month*; and therefore the information was in time.

2dly. The witness swearing to the offence

offence being committed on "the *said* 12th of *May*," sufficiently refers to the 12th of *May* 1805, the day charged in the information, so as to shew that the offence was committed within the three months; for it is the relation of the evidence *by the magistrates*, who also state that the witness deposed *in the premises*.

3dly, By the statement of the proceedings in the conviction, it appears to have been all one continuing transaction, from the appearance of the defendant after the summons to the close of the conviction; and this appears both from the antecedent dates of *May* 1805, and the date of the conviction to have been on the 4th of *June* 1805; because the defendant is stated to have been afterwards (i. e. after the information exhibited) summoned, and to have appeared *on the 4th of* June, and the conviction was signed and sealed on the 4th of *June* 1805. And it thereby also appears, that the evidence was given in the defendant's presence, as his departure pending the continuance of the transaction will not be presumed. And it thereby also appears that the conviction took place on the 4th of *June* 1805.

4thly, The witness deposing that he found "a floor of *malt* in operation," very wet, &c. being the language of the witness and intelligible to a common intent, sufficiently proves the offence charged of wetting *corn or grain making into malt, in a state of operation*.

5thly, The witness, an excise officer, stating in language appropriate to his employments that he *surveyed* the *malt-house* of *the defendant* on the 12th of *May*, and there found a floor of malt in operation, &c. is prima facie evidence that the defendant was at that time a *maltster*; for otherwise it could not be properly called *his malt-house*, nor would the officer have had authority to *survey* it; as by the excise laws a party must *enter* his malt-house before the officer can *survey* it. *The King* v. *Crisp*, E. 46 G. 3. 389

COPYHOLD AND CUSTOMARY ESTATES.

See CUSTOM, No. 1.

1. The devisee of a copyhold or customary estate, which had been surrendered to the use of the will, having died before admittance, her devisee, though afterwards admitted, cannot recover in ejectment; for his admittance has no relation to the last legal surrender; but the legal title remains in the heir of the surrenderor. Though if the first devisee have been considered to be admitted in construction of the law, (the devise to her being in remainder after a devise to one who was customary heir of the surrenderor, and who paid rent to the lord for several years, but though required to come in and be admitted, had never done so;) or if the admittance of the first devisee's heir could be considered as an admittance, by relation back, of the first devisee herself; yet she not having surrendered to the use of her will, her devisee could not take the legal estate. But whether the heir of the surrenderor would be considered as a trustee for the second devisee, a court of equity is alone competent to decide. *Doe d. Vernon* v. *Vernon, M.* 46 *G.* 3. 8

2. There can be no general occupancy of a copyhold, because the freehold is always in the lord; and the statutes 29 *Car.* 2. *c.* 3. *s.* 12. and 14 *G.* 2. *c.* 20. *s.* 9., appropriating estates per autre vie where there is no special occupant, do not extend to copyholds. And one who was admitted tenant upon a claim as administrator de bonis non to the grantee of a copyhold per autre vie, having no title in such character, cannot recover in ejectment by virtue of such admission as upon a new and substantive grant of the lord. *Zouch dem. Forse* v *Forse, H.* 46 *G.* 3 186

3. One may hold the prima tonsura of land as *copyhold*, and another may have the soil and every other beneficial enjoyment of it as *freehold*. And ancient admissions of the copyholder, and

and those under whom he claims the land, by the description of "tres acras prati," may be construed only to carry the prima tonsura, if in fact they have enjoyed no more under such admissions, while another has had the after-crop, and has cut the trees and fences, scoured the ditches, repaired the fences, and kept the drains; though the copyholder may have paid all the rates and taxes, which was in his own wrong, *Stammers* v. *Dixon*, *H.* 46 *G.* 3. 200

4. The *freehold* of an estate, parcel of a manor, and demiseable only by the licence of the lord, passing by surrender and admittance, to which the tenant was admitted by the description of a customary tenement, habendum to her and her heirs, tenendum of the lord by the rod, according to the custom of the manor, by the accustomed rent, suit of court, customs, and other services, is in the *lord* and not in the *tenant*; though not holden *ad voluntatem domini*. But such an estate, whether strictly copyhold or not to all purposes, may well pass under the description of *copyhold* in a will: the intention to pass it under that description being apparent, *Doe d. Cook and Wife* v. *Danvers*, *H.* 46 *G.* 3. 299

5. Such customary estate is not within the 5th section of the statute of frauds, 29 *Car.* 2. *c.* 3. so as to require to a devise of it the signature of the party, or the attestation of witnesses. Nor is it within the 7th section as a declaration of trust, requiring to be proved by a writing *signed by the party*; which applies only to cases where the legal and equitable estates are separated: or by a will *in writing*; which must be understood only of such a will of lands as the statute recognizes, viz. a will attested by three or four witnesses. But held that it might well pass by instructions for a will taken in writing by another, in the presence and from the oral dictation of the party, though without any signature or attestation, which was established as her will by the ecclesiastical court granting probate thereof, and is a good *will* under the statute of wills; the estate having been surrendered to the use of her last will in writing. *Doe d. Cook and Wife* v. *Danvers*, *H.* 46 *G.* 3. 299

6. Such estates pass, not by the will alone, but by the will and surrender taken together. And the entry of the devisee after 20 years from the death of the testatrix in 1780, but within 20 years after the determination of a lease in 1800, before granted by her, (rendering rent, with a proviso for re-entry in case of non-payment,) was neither tolled by a descent cast on the defendant from his father, who as heir at law of the testatrix had been admitted in 1782, and had received the rent to the time of his death in 1791, after which the defendant was admitted and received the rent; the doctrine of descent cast not applying to cases where the party has no remedy but by entry; as in the case of a devisee; nor to copyhold or customary estates where the freehold is in the lord. Nor was such entry barred by the statute of limitations, 21 *Jac.* 1. *c.* 16., having been made within 20 years after the old lease expired; the devisee not being bound to enter before, as for a condition broken, by the non-payment to her of rent. *ib.*

7. Where the tenants of a manor, formerly belonging to a monastery holding *by border service, and the defence of Tynemouth Castle*, under *copy of court roll*, and whose estates passed *by surrender and admittance*, shewed in evidence by surrenders as far back as they existed in writing; by admissions from the 17th *Eliz.* to the 14th *Car.* 1.; by Exchequer decrees between the lords and tenants in the times of *Eliz.* and *Jac.* 1.; and by an inquisition of the jury at the court-baron of the lord in the 2d of *Jac.* 2.; that they were *copyholders of inheritance*, with *fines certain*, holding *according to the custom of husbandry of the manor*, (*or according to the custom of the manor* generally,) without stating them to hold *at the will of the lord*: admitting this evidence to outweigh proof of minister's accounts in the

the 30th and 31st *Hen.* 8.; a grant of the manor from the crown in the 9th *Car.* 1. including these estates under the name of *tenements of husbandry*; subsequent mesne conveyances reserving the coal-mines, &c. in certain districts; and admissions from 1663 to 1777 (including admissions of the several tenants to the estate immediately in question;) in all which they were stated to hold *at the will of the lord*, as well as *according to the custom of husbandry of the manor*, &c.: yet as there was evidence for more than a century past that the lord had leased the coal and lime-stone under the copyhold lands in different parts of the manor, and had received rent for the same; and that the lessees of the lord, and not the tenants, had taken the coals and lime-stone: held that such *acts of ownership* explained the nature of the tenure, *according to the custom of husbandry of the manor*, &c. and shewed, in aid of the other evidence, that the *freehold* was in the *lord* and not in the *tenants*. And at any rate the evidence preponderating so much in favour of the lord, the Court would not disturb a verdict given for him. *Brown* v. *Rawlins*, *T.* 46 *G.* 3. 409

COSTS.

1. No costs are allowed on the statute 3 *H.* 7. *c.* 10. where a writ of error is nonprossed before the transcript of the record by the Clerk of the Errors of *B. R. Salt one, &c.* v. *Richards*, *H.* 46 *G.* 3. 111
2. Where to trespass at *A.*, and throwing down, burning, and totally destroying the plaintiff's *hedge, there then erected*, &c. whereby &c. the defendant pleads the general issue, and justifies as to the throwing down the hedge, because it was erected on a common over which he prescribes for right of common; and issue is taken on such right, which is found for him, and a verdict for the plaintiff, with 20*s.* damages on the general issue; the facts stated in the special plea, and found, cannot be taken into consideration to shew that the title to the freehold could not come in question on the declaration; and as on the declaration the freehold might have come in issue, and the Judge did not certify, the plaintiff is entitled to no more costs than damages. *Stead* v. *Gamble*, *H.* 46 *G.* 3. 325
3. Where two several petitions signed by different persons were presented to the House of Commons against the return of members to serve in parliament for *East Grinstead*; which petitions were referred to the same select committee for trial, who reported them both to be frivolous and vexatious; the costs cannot be taxed *jointly* under the fiat, 28 *G.* 3. *c.* 52.; and therefore the Speaker having first certified a joint taxation of costs for a certain sum against all the petitioners; and having afterwards by an amended certificate apportioned how much of the first mentioned sum taxed was incurred by the sitting members in opposing the two petitions *jointly*, and how much was incurred by them in opposing each *separately*; the plaintiffs by the advice of the Court submitted to enter nonsuits as well in two several actions prosecuted against the respective petitioners for the *separate* costs certified against each, as also in a joint action against all to recover the taxation certified against them all *jointly*. *Strachey, Bart.* v. *Turley and Others*, *T.* 46 *G.* 3. 507
4. If there be a certificate against any more costs than damages upon the stat. 43 *Eliz. c.* 6. *s.* 2. the plaintiff shall not have the costs of the double pleas, on which all the issues were found for him; although the Judge have not certified upon the stat. 4 *Ann. c.* 16. *s.* 5. that the defendant had probable cause to plead the several special matters; that section, which says that "if a verdict be found on any issue "for the plaintiff costs shall be given, "&c. unless the Judge who tried the "said issue shall certify," &c. only applying to cases where one at least of the special pleas is found for the defendant, which would entitle him to the general costs. *Richmond* v. *Johnson, Clerk*, *T.* 46 *G.* 3. 583

COUNTY,

See EVIDENCE, No. 1.

COURTS.

See LONDON COURT OF CONSCIENCE.

The stat. 2 *G.* 2. *c.* 22. and other acts relieving insolvent debtors, charged in execution on process out of *any of the courts of law* extend to *inferior* as well as *superior* jurisdictions. *Rex* v. *Bailiffs of Ipswich, M.* 46 *G.* 3. 84

COVENANT,

See GRANT.

1. The lessor, after a demise of certain premises with a portion of an adjoining yard, covenanted that the lessee should have "the *use* of the pump in the yard jointly with himself, *whilst the same should remain there*, paying half the expences of repair." The words *whilst*, &c. reserve to the lessor a power of removing the pump at his pleasure; and it is no breach of the covenant though he remove it without reasonable cause, and in order to injure the lessee. But without these words it would have been a breach of covenant to have removed the pump. *Rhodes* v. *Bullard, H.* 46 *G.* 3. 116
2. An action of *covenant* does not lie upon the stat. 3 *W.* & *M. c.* 14. against the devisee of land to recover damages for a breach of covenant made by the devisor; but the remedy thereby given is confined to cases where *debt* lies. *Wilson* v. *Knubly, H.* 46 *G.* 3. 128
3. One in consideration of 5*l.* 8*s.* in nature of a fine, and of a yearly rent of 6*s.* 9*d.*, demised certain ground, with the buildings, &c. for 21 years, with a proviso for distress if the rent was in arrear for 14 days. And the lessor covenanted at the end of 18 years of the term, or before, on request of the lessee, to grant a new lease of the premises, "for the like fine, for the like term of 21 years, at the like yearly rent, *with* ALL *covenants, grants, and articles as in that indenture were contained*;" held that this covenant was satisfied by the tender of a new lease for 21 years containing *all* the former covenants *except the covenant for future renewal*. And held that an averment, that the covenant for renewal in the indenture declared on corresponded with *various other leases*, before then successively made by the owners of the inheritance, for the time being, could not be taken in aid to construe the meaning of the indenture: for supposing such evidence were admissible in any case where the renewals had been uniformly the same, yet non constat from this averment that *all* the former leases contained the same covenant for renewal. *Iggulden* v. *May, H.* 46 *G.* 3. 237
4. Where assignees of a bankrupt advertised the lease of certain premises, of which the bankrupt was lessee, for sale by auction, (without stating themselves to be the owners or possessed thereof,) and no bidder offering, they never took possession in fact of the premises; held that this was no more than an experiment to ascertain the value, whether the lease were beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term; nor support an averment in a declaration in covenant against them by the landlord, that all the estate, right, title, interest, &c. of the bankrupt in the premises came *to the defendant by assignment thereof*. *Turner* v. *Richardson and another, Assignees of Barber, a Bankrupt, E.* 46 *G.* 3. 335

CROSS-EXAMINATION,

See EVIDENCE. No. 2.

CURATE, OR CHAPLAIN.

1. In a writ of mandamus such facts should be alleged as are necessary to shew that the party applying for it is entitled to the relief prayed. Therefore where a mandamus to the ordinary to licence a curate or chaplain only stated that he had been *duly nominated and appointed by the inhabitants* of a township to be curate or chaplain of the church of *P.*; without stating either the consent of the rector,

rector, or any endowment or custom for the inhabitants to make such nomination and appointment, the Court quashed the writ. *The King* v. *The Bishop of Oxford*, E. 46 G. 3. 345

2. A chapel in the township of *P.* was endowed in 1428, by a deed executed by the then impropriator of the rectory, the then vicar, and the inhabitants of the township, and confirmed by the diocesan, whereby in consideration of a yearly payment to the vicar, it was provided that the curate of the chapel should receive all the tithes due to the vicar, from the said inhabitants, and should be appointed by them: under which deed they continued to exercise the power of appointment and presentation. In 1797 an act passed for inclosing open lands in the township, in which it is recited, as if a matter of doubt, whether the curate were entitled to the small tithes or to a modus in lieu of tithes, the decision of which is left untouched by the act. In 1801, upon a vacancy, the inhabitants appoint and present a curate upon an agreement signed by him and the principal inhabitants, wherein they state that he is appointed to the curacy, &c. and *to the money payment of* 40*l.* 8*s.* 2*d. annually payable out of the lands and hereditaments in* P. in right of the said curacy, together with surplice fees and *all other profits, privileges, and appurtenances to the same belonging and of right payable:* that the inhabitants considering that sum not sufficient for the proper support of the curate, had *voluntarily* agreed with him to pay a further annual sum of 29*l.* 11*s.* 10*d.* with a *proviso* that it "shall not in any respect alter the money payment of 40*l.* 8*s.* 2*d. wherewith the said lands are and have been* TIME IMMEMORIAL *charged in right of the said church.*" Held that this agreement, entered into for the purpose of restraining the then curate from asserting his claim to the small tithes by due course of law, and furnishing evidence against his successors, was *simoniacal*, and the presentation made thereon void. And the right of presentation having thereupon devolved upon the crown by stat. 31 *Eliz. c.* 6. *s.* 5., whose presence had been licensed by the ordinary, a mandamus to the ordinary to licence another curate subsequently appointed and presented by the inhabitants, who had given notice of having withdrawn their former nomination and presentment, and cancelled the agreement, was denied; and the rule was discharged with costs. *The King* v. *The Bishop of Oxford*, T. 46 G. 3. 600

CUSTODY,

See COMMITMENT BY PAROL.

CUSTOM.

A custom that all the customary tenants of a manor *having gardens, parcels* of their customary tenements respectively, have immemorially by themselves, their tenants and occupiers, dug, taken, and carried away from a waste within the manor, to be used upon their said customary tenements, *for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively, for the* IMPROVEMENT *thereof, such turf covered with grass, fit for the pasture of cattle, as hath been fit and proper to be so used,* at *all* times of the year, *as often and in such quantity as occasion hath required,* is bad in law, as being indefinite and uncertain, and destructive of the common: and so is a similar custom for taking and applying such turf *for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences* of such customary tenements. *Wilson* v. *Willes, Knt. H.* 46 G. 3. 121

CUSTOMARY ESTATE,

See COPYHOLD, &c.

DATES WITH REFERENCE,

See CONVICTION, No. 2.

DEBT.

An action of covenant does not lie upon the stat. 3 *W.* & *M. c.* 14. against the devisee

devisee of land to recover damages for a breach of covenant made by the devisor; but the remedy thereby given is confined to cases where *debt* lies. *Wilson* v. *Knubley*, *H.* 46 G. 3. 128

DEED,

See AWARD, No. 2.

The Sessions presumed that an indenture of apprenticeship executed 30 years before, and under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, and proved to be lost, and when the parish in which he was settled under such indenture had relieved him for the last 12 years, was properly stamped in proportion to the apprentice fee of 12*l.* received by the master; although the deputy registrar and comptroller of the stamp duties proved that it did not appear in the office that any such indenture had been stamped or inrolled during that period: and the judgment of the justices was confirmed in *B. R. The King* v. *The Inhabitants of Long Buckby*, *M.* 46 G. 3. 45

DESCENT CAST.

The entry of a devisee of copyhold or customary estate after 20 years from the death of the testatrix in 1780, but within 20 years after the determination of a lease in 1800, before granted by her, (rendering rent, with a proviso for re-entry in case of non-payment,) was not tolled by a descent cast on the defendant from his father; who as heir at law of the testatrix had been admitted in 1782, and had received rent to the time of his death in 1791, after which the defendant was admitted and received the rent; the doctrine of descent cast not applying to cases where the party has no remedy but by entry, as in the case of a devisee; nor to copyhold or customary estates where the freehold is in the lord. *Doe d. Cook and Wife* v. *Danvers*, *H.* 46 G. 3. 299

DETAINER IN CUSTODY,

See COMMITMENT BY PAROL.

DEVISE.

1. Under a devise to the testator's widow of "200*l.* per annum for life in addi- "tion to her jointure," (which jointure it appeared was secured by a term out of his real estates) "his "debts being previously paid: and "to his younger children 6000*l.* each, "to be paid respectively at 21;" after which the testator "appointed "*A. B.*, and *C.*, *as trustees of inherit-* "*ance* for the execution thereof:" held by three Judges, that the trustees thereby took a fee in the testator's *lands;* against one Judge, who thought the meaning of those words too uncertain to disinherit the heir at law. *Trent* v. *Hanning*, *H.* 46 G. 3. 97
2. The word *estate* will carry a fee in a will, if not restrained by other words; and held that it was not restrained in a devise of "all my estate, lands, &c. "known and called by the name of "the *Coal-yard* in the parish of *Saint* "*Giles, London.*" *Roe dem. Child and Wife* v. *Wright*, *H.* 46 G. 3. 259
3. One devised a leasehold for a long term after the decease, &c. of *S. K.* to *T. C.* for life, remainder to his child or children by any woman whom he should marry, and his or their executors, &c. for ever; upon condition that *in case the said T. C. shall die an infant unmarried, and without issue*, the premises to go over to his father *W. C.* and his three other children, share and share alike, and their heirs, executors, &c. Held that the devise over depended upon *one contingency*, viz. *T. C.*'s *dying an infant*, attended with *two qualifications*, viz. his dying *without leaving a wife surviving him*, or dying *childless;* and that the devise over could only take effect in case *T. C.* died in his minority, leaving neither wife nor child: and here it failed, *T. C.* having attained 21, and *married before his death. Doe d. Everett and others*, v. *Cooke*, *H.* 46 G. 3. 269

4. Though the devise of a term for life, with a contingent remainder over, will in general only entitle the first taker to a life estate, if the remainder over do not take effect; and the residue of the term will go to the personal representative of the testator; yet the testator's intent appearing to be to dispose of the whole from his executors; held that the lessors of the plaintiff, who claimed under his will, were entitled to recover after the death of *T. C.* without issue. 269
5. An estate, whether strictly copyhold to all purposes, or customary estate the freehold of which is in the lord, may well pass under the description of copyhold in a will; the intention to pass it under that description being apparent. *Doe d. Cooke and Wife* v. *Danvers, H.* 46 G. 3. 299
6. A devise to one by the name of *Mary*, whose Christian name was *Elizabeth*, is good; if the jury find from the circumstances that she was the person meant to be designated. *ib.*
7. One having an only child *Rebecca*, who was married and had three children, *Thomas, Rebecca*, and *Ann*, devised his copyhold to *Rebecca* his daughter for life, remainder to his grand-daughter *Rebecca* for life, remainder to trustees to preserve contingent remainders, remainder to the use of the *issue of the body* of his grand-daughter *Rebecca*, in such parts, shares, and proportions, *manner and form*, as she should by deed or will appoint; and in default of appointment to the use of all and every the *children* of his said grand-daughter and *their heirs*, as tenants in common; and, *in default of such issue*, to the use of all and every the other children of his daughter *Rebecca* and their heirs, as tenants in common, &c.: and in default of such issue, to his own right heirs. Held that upon the death of the testator's daughter and of his grand-daughter *Rebecca*, without any appointment, an only child of the latter took an absolute fee; on whose death, under age and unmarried, the premises descended to her uncle *Thomas* as her heir at law; and that the subsequent limitations to the other children of the testator's daughter *Rebecca* did not take effect. For the devise to the *children* of his grand-daughter *Rebecca* and *their heirs* primâ facie carries a fee; and the subsequent words, "in default of *such issue*," refer to *her children*, and not to *their heirs*; though the limitation over *in default of such issue* be made to those who might take as heirs to the children of *Rebecca* the grand-daughter. And the intention of the devisor that her children, if any, should take *a fee* is further evinced by this, that the limitation to them and their heirs is in default of appointment, under a power given her to appoint "to the use of "the issue of her body in such *manner* "and *form* (as well as in such parts, "shares and proportions) as she should "direct;" under which words "*man-*"*ner and form*" she might have appointed to all or any of her children *in fee*, and was not restrained to appoint to them *in tail only*; which limitation, in default of appointment, is a substitution for the execution of the power. *The King* v. *The Marquis of Stafford and others, T.* 46 G. 3. 521

DEVISEE OF LAND.

An action of *covenant* does not lie upon the stat. 3 *W & M. c.* 14. against the devisee of land to recover damages for a breach of covenant made by the devisor: but the remedy thereby given is confined to cases where *debt* lies. *Wilson* v. *Knubley, H.* 46 G. 3. 128

EJECTMENT,

See COPYHOLD, No. 2.

1. The devisee of a copyhold or customary estate, which had been surrendered to the use of the will, having died before admittance, her devisee, though afterwards admitted, cannot recover in ejectment; for his admittance has no relation to the last legal surrender: but the legal title remains in the heir of the surrenderor. Though if the first devisee had been considered to be

be admitted in construction of law, (the devise to her being in remainder after a devise to one who was customary heir of the surrenderor, and who paid rent to the lord for several years, but though required to come in and be admitted, had never done so;) or if the admittance of the first devisee's heir could be considered as an admittance, by relation back, of the first devisee herself; yet she not having surrendered to the use of her will, her devisee could not take the legal estate. But whether the heir of the surrenderor would be considered as a trustee for the second devisee, a court of equity is alone competent to decide. *Doe d. Vernon* v. *Vernon, M.* 46 G. 3. 8

2. The entry of a devisee, *after* 20 years from the death of the testatrix in 1780, but *within* 20 years after the determination of a lease in 1800, before granted by her, (rendering rent, with a proviso for re-entry in case of non-payment,) was neither tolled by a descent cast on the defendant from his father, who as heir at law of the testatrix had been admitted in 1782, and had received the rent to the time of his death in 1791, after which the defendant was admitted and received the rent; the doctrine of descent cast not applying to cases where the party has no remedy but by entry; as in the case of a devisee; nor to copyhold or customary estates where the freehold is in the lord. Nor was such entry barred by the statute of limitations, 21 *Jac.* 1. *c.* 16., having been made within 20 years after the old lease expired; the devisee not being bound to enter before, as for a condition broken, by the non-payment to her of rent. *Doe d. Cook* v. *Danvers, H.* 46 G. 3. 299

3. In ejectment upon a clause of re-entry in a lease on non-payment of rent, against the assignee of the lease, proof by the lessor of the counterpart of the lease, by the subscribing witness, is sufficient proof of the holding upon the condition of re-entry in case of non-payment of rent. And where the witness who proved the demand of the rent had a power of attorney from the lessor for that purpose, which he notified to the tenant, and had ready to produce; held sufficient, though he did not produce it at the time of the demand; the tenant not questioning his authority. *Roe d. West* v. *Davis, E.* 46 G. 3. 363

4. The Court will not, *after* a trial, stay the proceedings on payment of the rent, &c.; the stat. 4 *G.* 2. *c.* 28. only warranting such application *before* trial. And that statute is not confined to cases of ejectment brought after half a year's rent due *where no sufficient distress was to be found on the premises. ib.*

5. Under an agreement of demise, dated in *January*, of a dwelling-house, mills, and other buildings for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching grounds, watercourses, &c. for a term of 35 years *to commence* as to the *meadow* ground *from the 25th of* December *last*: as to the pasture from the 25th of *March* next, and as to the *housing, mills, and all the rest of the premises* from the 1st of *May*; reserving the *first half year's rent* on the day of *Pentecost*, and the other half-year's rent at *Martinmas*; held that the substantial subject of demise being the house and buildings for the purpose of the manufacture, which were to be entered on the 1st of *May*; that was the substantial time of entry to which a notice to quit ought to refer, and not to the 25th of *December*, when the incoming tenant had liberty of entering on the *meadow*, which was merely anciliary to the other and principal subject of demise; and consequently that a notice to quit served on the 28th of *Sept.* (which would have been sufficient with reference even to the 25th of *March*, the day of entering on the pasture ground; the 29th of *September* being the corresponding half yearly day of holding to the 25th of *March*,) to quit *at the expiration of the current year of holding* was sufficient. *Doe d. Lord Bradford* v. *Watkins and another, T.* 46 G. 3. 551

6. Proof of notice to quit served on one of two tenants, to whom there was a joint demise on the premises, is sufficient for the jury to presume that it reached the other tenant who lived elsewhere. 551

ELECTION.

Where there is no regular presiding sworn officer at an election, (*e. g.* of church-wardens, one of whom by custom was chosen by parishioners paying scot and lot, and the other appointed by the rector, which latter in fact presided,) the control of the election devolves at common law upon the electors themselves: but unless there be a custom to regulate the time for making such election, it is not competent to a majority of the electors assembled at the time of such election to narrow the period which the common law would allow; and therefore a resolution by them that it shall conclude at a given time must at least limit a time reasonable in itself with respect to numbers and distance, and be of sufficient notoriety. But whether a resolution by a majority of the vestry on the first day of the election to close the poll at four o'clock on the next day, in a parish where the number of electors did not exceed 180, and where the affidavits stated a custom for 200 years not to keep the poll open for more than two days, and no instance within living memory of extending it beyond four o'clock on the second day, were sufficient to warrant the closing of the poll at that time, while some of the voters were still coming in to poll, and others had no notice of the resolution, was a fit question to be tried upon a mandamus. *The King* v. *The Commissary of the Consistorial and Episcopal Court of the Bishop of Winchester in and for the Parts of Surrey*, T. 46 G. 3. 573

ELECTION COMMITTEE,

See Costs, No. 3.

ELECTION OF REMEDIES.

See Insolvent Debtors, No. 2.

ENTRIES,

See Evidence, No. 7.

ENTRY,

See Ejectment, No. 2.

EQUITABLE INTEREST,

See Bail-bond, No. 1.

ESTATE,

See Devise, No. 2.

ESTATES PUR AUTRE VIE.

See Occupant.

EVIDENCE.

1. The publisher of a public register receives an anonymous letter, tendering certain political information on *Irish* affairs, and requiring to know to whom his letters should be directed; to which an answer is returned in the register; after which he receives two letters in the same hand-writing, directed as mentioned, and having the *Irish* post-mark on the envelopes; which two letters were proved to be in the hand-writing of the defendant; the previous letter having been destroyed: This is a sufficient ground for the Court to have the letters read; and the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the register *in Middlesex* for the purpose of publication, the whole is evidence sufficient for the jury to find a *publication* by the procurement of the defendant *in Middlesex*. *Rex* v. *The Hon. Robt. Johnson*, *M.* 46 G. 3. 65

2. A witness cannot be cross examined as to any collateral independent fact irrelevant to the matter in issue, for the purpose of contradicting him if his answer be one way by another witness, in order to discredit the whole of his testimony. *Spencley q. t.* v. *De Willott*, *H.* 46 G. 3. 105

3. Where a penalty is to be sued for before justices of peace within a certain time after the offence committed, upon a com-

a conviction for such offence returned by certiorari into *B. R.*, it ought to appear on the face of the evidence stated in such conviction, that the prosecution was in time: and if the witness be only stated to have mentioned *the month* in which the offence was committed, *omitting the year*, and there be no word of reference to connect it with the true date, the omission cannot be supplied either by reference to the offence charged in the information, or by presumption arising from the justices having convicted the defendant. *Rex* v. *Woodcock*, *H.* 46 G. 3. 146

4. The right to convert a *brush-wood* into a *stone* weir, is not evidenced by shewing that 40 years ago two thirds of it had been so converted, without interruption; and the action for the injury having been brought within 20 years after the remaining third part was so converted. *Weld* v. *Hornby*, *H.* 46 G. 3. 195

5. Whether or not a parish can have the benefit of the stat. 43 *Eliz. c.* 2.; by maintaining its poor with not more than four overseers, is a fact which the Sessions ought to find, and not leave to be presumed by the Court from other conflicting evidence stated in a case reserved; such as that the parish had the benefit of the statute down to 1739, and that from thence to 1753 it was uncertain how the poor were maintained there, and that from the latter period the poor had been maintained separately in six townships; but that the population was decreased. *Rex* v. *Watson*, *H.* 46 G. 3. 214

6. In covenant for not granting a new lease, *with a covenant for further renewal*; held that an averment that the covenant for renewal in the indenture declared on corresponded with *various other leases*, before then successively made by the owners of the inheritance for the time being, could not be taken in aid to construe the meaning of the indenture; for supposing such evidence were admissible in any case where the renewals had been uniformly the same, yet non constat from this averment that all the former leases contained the same covenant for renewal. *Iggulden* v. *May*, *H.* 46 G. 3. 237

7. Where *A.*, tenant for life, with a limited power of leasing, reserving the ancient rent, received a letter from a confidential agent in 1728, containing a minute account of the tenants and rents of the estate; which letter the tenant for life indorsed *"A particular of my estate,"* &c. and handed down to *B.* the succeeding tenant for life, who had a like limited power of leasing, by whom it was also preserved and handed down amongst the muniments of the estate to the first tenant in tail: held that such paper was evidence for the tenant in tail against a lessee of *B.*, in order to shew that the rent reserved by *B.* the tenant for life, was less than the *ancient* rent reserved at the time to which such paper referred; the paper having been accredited by the then owner of the estate, who had the means of knowing the fact, and who had an interest the other way, viz. to diminish the rent in order to increase his fine upon renewal under the power. And held also that entries by *A.* the tenant for life in his book, of the receipt of the rent to the amount stated, were also evidence of the same fact. *Roe d. Brune, Clerk*, v. *Rawlins*, *H.* 46 G. 3. 279

8. The hand-writing of persons long since dead may be proved by comparison of hands. *ib.*

9. In ejectment upon a clause of re-entry in a lease on non-payment of rent against the assignee of the lease, proof by the lessor of the counterpart of the lease, by the subscribing witness, is sufficient proof of the holding upon the condition of re-entry in case of non-payment of rent. And where the witness who proved the demand of the rent had a power of attorney from the lessor for that purpose, which he notified to the tenant, and had ready to produce; held sufficient, though he did not produce it at the time of the demand; the tenant not questioning his authority. *Rowe d. West* v. *Davis*, *E.* 46 G. 3. 363

10. Whe-

10. Whether or not the fact of putting a letter into the post-office, containing notice of the dishonour of a bill to the drawer to whom it was directed, be of itself sufficient evidence to be left to the jury that such notice reached the drawer; at any rate, if a bill be accepted payable at *A.*'s, who is the acceptor's banker, the party taking such special acceptance, (which he is not bound to do) thereby impliedly agrees to present it for payment within the usual banking hours at the place where it is made payable; and if he present it after such hours, without effect, it is no evidence of the dishonour of the bill so as to charge the drawer. *Parker* v. *Gordon, E.* 46 G. 3. 385

11. Where the plaintiff declares upon a quantum meruit for work and labour done, and materials found, it is competent to the defendant, even without notice to the plaintiff, to prove that the work done was not worth so much as the plaintiff claims. And if it appear that the plaintiff had been paid on account as much as the work was worth, he cannot recover. And so it seems that the defendant may be let into such a defence where the contract was for the work to be done at a certain price; at least if he give the plaintiff previous notice of such defence that he may be prepared to meet it. And, quære, if the work done be wholly inadequate to answer the purpose for which it was undertaken to be performed, whether the defendant may not be let into such defence even without notice. *Basten* v. *Butter, T.* 46 G. 3. 479

12. Where the debt was paid after an alias pluries writ issued, the defendant cannot object at the trial that the latitat was not returned; for at any rate if the alias pluries were the commencement of the action, it is only an irregularity, which though a ground for application to the Court to set aside the proceedings, yet having been once waved, cannot afterwards be objected to. Neither can it be objected at the trial that when the debt was paid the defendant had no notice of any action commenced or costs incurred. *Toms* v. *Powell, T.* 46 G. 3. 536

EXECUTION.

A defendant, superseded for want of being charged in execution within two terms *after* judgment, cannot be again arrested and taken in execution upon same judgment. Aliter, if superseded for want of proceedings in time *before* judgment. *Line* v. *Lowe, H.* 46 G. 3. 330

EXECUTOR,

See ADMINISTRATOR, &c.

FALSE IMPRISONMENT.

The stat. 13 *G.* 3. *c.* 80. gives a penalty in case of killing game on a *Sunday*, and directs that it shall be forthwith paid on conviction, and that in case of neglect or refusal to pay, or give security for the payment of it, the justice shall by warrant under his hand and seal cause the same to be levied by distress and sale of the offender's goods; and that it shall be lawful for such justice to order such offender to be detained in custody until return may conveniently be made to such warrant of distress, unless the party convicted shall give security for his appearance, &c. Held that such order to detain in custody until the return of the warrant of distress may be by parol. *Still* v. *Walls and Harris, T.* 46 G. 3. 533

FEME COVERT,

See BARON AND FEME.

FISHERY,

See MANDAMUS, No. 4. WEIR.

FOREIGN ATTACHMENT.

A creditor for goods sold and delivered to a trader, who had committed a secret act of bankruptcy, not being cognizant thereof, attached money of the traders in the hands of a third person, and recovered judgment in the mayor's court of *London* against the garnishee,

garnishee, who thereupon *paid* him the amount of the debt so attached; and afterwards a commission issued: held that this payment was not protected by the stat. 19 G. 2. c. 32., not being a payment made *by the bankrupt* in the usual and ordinary course of trade and dealing: and held that the assignees of such bankrupt, under a *third* commission issued against him, might sue for and recover back such payment, although the bankrupt, who had obtained his certificate under his former commissions, had not paid 15*s.* in the pound under the second of them; in which case his future effects remain liable to that extent to his creditors, under the second commission respectively. *Hovil and others, Assignees of Wardell, a Bankrupt,* v. *Browning, H.* 46 G. 3. 154

FRAUDS, STATUTE OF,

See COPYHOLD, &c. No. 5. SALE OF GOODS BY SAMPLE.

FRAUDULENT CONVEYANCE,

See BANKRUPT, No. 2.

FREEHOLD,

See COPYHOLD, &c. No. 3.

FREIGHT,

See INSURANCE, No. 1, 4.

GAME,

See COMMITMENT BY PAROL. PENAL ACTION, No. 1.

GRANT,

See COVENANT.

A. and *B.* being severally seised of parcels of woody ground, and *B.* having other lands adjoining to his woody ground, and intending to make a colliery under his ground, *A.* grants to *B., his heirs and assigns,* liberty for *him, his heirs and assigns,* to carry up a sough or drain through *A.*'s woody ground, into *B.*'s woody ground, and *also* liberty for *B., his heirs and assigns,* to make *two* little sough-pits in *A.*'s woody ground, for the more easy and safe carrying up the tail of the sough, one of which was to be covered in *as soon as conveniently might be after making the sough,* and the other to be kept open for examining the sough *so long as was necessary for that purpose and no longer:* and *B.* covenanted that he, *his heirs and assigns,* would not damage the trees growing on *A.*'s woody ground, nor get any of the coals under it, except what should arise in the drift of the intended sough; and that *A. his heirs and assigns, from time to time, and at all times after,* might go down into any pit or pits of *B.*, his heirs or assigns, to discover whether any coals of *A.*, his heirs or assigns should be gotten: and that *B., his heirs and assigns,* should *repair* any injury to *A.*'s fence, &c.; held that by the grant to *B., his heirs,* &c. of *the liberty of making the sough in* A.'s *land,* the liberty of making *sough-pits* at any time afterwards, while the object of the grant remained, *being necessary for the purpose of repairing the sough,* passed as *incident* thereto: and that the use of such sough, for the carrying up of which into *B*'s woody ground liberty was granted, was not confined to the getting of coals under *B.*'s woody ground, but extended also to the adjoining lands of *B.*; and that the liberty of making new sough-pits for necessary repairs of the sough, after the two original sough-pits had been covered up by mutual consent, was not controlled by the special liberty given for making such original sough-pits, the uses of which were limited by the grant; it appearing upon the face of it that the grant of the sough was intended to have continuing operation while any coals in *B.*'s woody ground and adjoining lands remained to be gotten. *Hodgson* v. *Field, T.* 46 G. 3. 613

GUARDIANSHIP,

See BASTARD, No. 2.

HABEAS

HABEAS CORPUS.

1. Where, upon a habeas corpus to bring up the body of an apprentice, the keeper of the House of Correction returned, with the body of the party, a regular conviction of him by two magistrates on the stat. 20 *Geo.* 2. *c.* 19. for a misdemeanor in absenting himself as an apprentice from his master's service; it is no answer to shew by affidavit that the party had bound himself *when an infant* to serve till 25, and that when he came of age he elected to avoid the indentures, after which the offence imputed had been committed; for this was proper matter to be shewn to the magistrates below, who, if the matter shewn to them were true, acted at their own peril in committing the party; but this Court have no power to discharge an apprentice from his indentures; and are bound by the return of a regular conviction, where the objection does not appear on the face of the return, to remand the party. *Ex parte Gill, E.* 46 G. 3. 376

2. The Court will grant a habeas corpus to bring up the body of a bastard child, within the age of nurture, for the purpose of restoring it to the custody of the mother, from whose quiet possession it was taken, at one time by fraud, and afterwards by force; and this without prejudice to the question of guardianship, which belongs to the Lord Chancellor representing the king in Chancery. *The King* v. *Hopkins and Wife, T.* 46 G. 3. 579

HAND-WRITING,

See EVIDENCE, No. 1.

HUSBAND AND WIFE,

See BARON AND FEME.

IMPRESSING,

See BAIL, No. 1.

INCLOSURE.

The owner of a tenement may have two distinct rights of common for his cattle levant and couchant upon such tenement, upon different wastes, in different manors, under several lords; and therefore an allotment under one inclosure act, in lieu of his right of common upon one of such wastes, will not do away or lessen his claim for an equal allotment with other commoners, under a subsequent act for inclosing the other waste. Semble aliter; if the different wastes had appeared to have been originally holden under the same lord. *Hollingshead* v. *Walton, T.* 46 G. 3. 485

INDICTMENT.

One who was appointed collector of the property-tax by the proper constituted authorities, and who considered himself, and was considered by the commissioners to be such collector, but whose appointment turned out to have been informally made cannot be indicted at common law for the receipt of duties *by colour and pretence of being collector* of such duties; though the money were fraudulently collected and misapplied by him; because he was *in fact* appointed collector, and in that character received the money. And quære whether the stat. 43 G. 3. *c.* 99. *s.* 19. having enacted that no collector, &c. employed in the execution of that act shall be liable by reason of such execution to any *penalty* other than such as by that and another act may be inflicted, does not take away the common law remedy by indictment for offences against the act. *The King* v. *Dobson, H.* 46 G. 3. 218

INSOLVENT DEBTORS.

The stat. 2 *G.* 2. *c.* 22. and other acts of the same class, making general provisions for the relief of insolvent debtors charged in execution on process out of *any of the courts of law* extend to *inferior* as well as *superior* jurisdictions. But the application in both instances must be made before the end of the next *term* after the prisoner is charged in execution; except he can shew that his neglect arose from ignorance or mistake. *The King* v. *The*

v. *The Bailiffs of Ipswich, M.* 46 G. 3. 84

2. Mandamus to the Quarter Sessions to inquire and give the benefit of the insolvent debtors' act to a prisoner, if he were entitled to it, denied, where it appeared that he was in execution on the 1st of *Jan.* 1804 for a larger sum than the act extended to; though part of such sum were composed of a debt upon a judgment recovered, which the judgment creditor had an election given to him by the Lord Chancellor to prove under the commission by a future day, not arrived; but which it was stated that he had elected so to prove, and to abandon his judgment before the 1st of *Jan.* 1804, though the prisoner was not discharged by a judge's order from such execution till long after that day. *Ex parte John King, M.* 46 G. 3. 91

INSURANCE.

1. While a ship was forcibly detained in a foreign port, the owner abandoned first the *ship*, and then the *freight*, to the different sets of underwriters thereon, who paid as for a *total* loss; after which the ship was liberated, reshipped her cargo, which had been taken out, and returned home, *earning freight*, which was received by the assured. Quære, whether the assured, after an abandonment of the *ship*, (which was a *seeking* and not a *chartered* ship; on which a distinction may arise;) could abandon the *freight* to another set of underwriters? But assuming that he might, the ship and freight are *salvage* to the different underwriters, after deducting the following expences, which must be apportioned between them according to their several interests: 1. The expences of ship and crew in the foreign port, including port charges (besides the expence of shipping the cargo, which exclusively belongs to the underwriters on *freight*.) 2. Insurance thereon. 3. Wages and provisions of the crew from their liberation in the foreign port till their discharge here. 4. Wages (provisions were supplied by the foreign government) to the crew during their detention. But the assured was not entitled to deduct out of the freight received, payable to the underwriter on freight, 1. Charges paid at the port of discharge on ship and cargo. 2. Insurance on ship. 3. Diminution in value of ship and tackle by wear and tear on the voyage home. *Sharp* v. *Gladstone. M.* 46 G. 3. 24

2. A vessel sailing with corn, insured from *Waterford* in *Ireland* to *Liverpool*, by a policy, with a memorandum to be free from all but general average, was stranded near *Waterford* on the 28th of *Jan.*, and the vessel continued at high tide under water for near a month, during which time, from the 31st, the assured at low water were employed in saving the cargo, the whole of which was damaged, but the greater part recovered and kiln-dried: but no notice of abandonment was given to the underwriters in *London* till the 18th of *Feb.*; though there is a constant regular intercourse between *Waterford* and *Liverpool*, where some of the assured lived; which notice was holden to be out of time. For whether or not upon such a policy, where there was an opportunity of sending the corn saved to the place of its destination, within two months after the accident, in another vessel, the assured were entitled to abandon, as in case of a total loss; at all events they ought to have made their election to abandon within a *reasonable time*, (on which it seems that the judge ought to instruct the jury under the circumstances of the case;) and they cannot take the chance of endeavouring first to save and make the best of the cargo on their own account, and afterwards abandon when they find that they cannot turn it to their advantage. *Anderson* v. *The Royal Exchange Assurance Company, M.* 46 G. 3. 38

3. Goods insured on board a certain ship generally by her name, without any addition of country, and not represented to be of any particular country at the time of the policy subscribed; though the broker had before said she was *an American*

American when the ship was subscribed, and though she were in fact an *American*, need not be documented as such: and therefore in case of a capture by a foreign state for want of the documents required by treaty between that state and her own, the owner of the goods may recover against the underwriters. *Dawson* v. *Atty*, *E.* 46 G. 3. 367

4. Where a ship was chartered on a voyage from *London* to *Dominica* and back to *London*, at a certain rate of freight upon the outward cargo; and after delivering her outward cargo at *Dominica*, the charterers were to provide her a full cargo homeward at the current freight from *Dominica* to *London*, &c.: held that an insurance by the owner of the ship on the freight, *at and from* Dominica *to* London, attached while the ship lay at *Dominica* delivering her outward cargo, and before any part of the homeward cargo was shipped, during which time she was captured by an enemy; the contract of affreightment by the charter-party being entire, and the risk on the policy having commenced. *Horncastle* v. *Suart*, *E.* 46 G. 3. 400

5. Colonial produce cannot legally be shipped from the *British West Indies* for *Gibraltar*, and therefore the same cannot be insured on such a voyage. And it matters not that part of the cargo was shipped at one of the *West India* islands, with liberty to exchange it at another (which would have been legal) if in fact it were not exchanged, and its ultimate destination was *Gibraltar*. And the ship and cargo being lost off *Gibraltar*; though the assured could not recover, yet the premium having been paid upon an illegal insurance cannot be recovered back. *Lubbock* v. *Potts*, *T.* 46 G. 3. 449

6. Quære, Whether an insurance of a *British ship* against "*British capture, seizure, and detension*," be illegal and void; as such a capture, &c. may be *without lawful authority*. *Lubbock* v. *Potts*, *T.* 46 G. 3. 451

7. A ship on an *African* voyage, the common duration of which is several months, and sometimes extends to a twelvemonth or more, arrived on the coast in *August* 1799; and in *Feb.* 1800 her then commander wrote a letter to his owners, mentioning an attack on her at another place on the coast by the natives, who killed the captain and several of the crew, and wounded others; by means of which and of a fever the crew were reduced to five, and all those sickly, and not a man to be procured at hand: that they had been plundered of their clothes, &c. and their cabin stores were exhausted, and they did not know what to do. A second letter, dated 21st *April* 1800, from *Gaboon River*, mentioned their arrival there, *on the 24th of March*: that *the natives finding them weakly handed, and their goods taken from them, did as they pleased*: that they had *then* nine men on board; *but* their provisions run very low: that he had mentioned certain parts of the cargo *in his last letter*, and expected to ship the rest, and to sail at the end of the next *month*. An insurance was effected in *September* 1800, *on the production of the last letter only*, "*at* and from the ship's arrival at her first place of trade *on the coast of* Africa," &c. Held sufficient that the last letter truly stated the *then* condition and circumstances of the ship; which, though better than when the first letter was written, was yet *no fraudulent concealment of the former circumstances*; the second letter, both in its terms and contents, referring to a *former* letter; which it was the fault of the underwriters not to have called for, if they thought that a particular knowledge of former difficulties, in part subdued, and to the extent truly stated in the second letter, would have varied the risk: and when the underwriters, cognizant as they must be presumed to be of the common duration of such a voyage, could not fairly collect from the contents of the second letter that the *first arrival* of the ship *on the coast* was only *on the 24th of* March, when she was stated to have arrived *in Gaboon River*, and to have had much of her homeward-bound cargo on board on

21st

21st of *April*, and was expected to sail with the remainder by the end of *May*. *Freeland and another, Assignees of Tipping, a Bankrupt*, v. *Glover, T.* 46 G. 3. 457

JUDICIAL PROCEEDINGS.

See SEWERS.

It is libellous to publish a highly coloured acconnt of judicial proceedings, mixed with the party's own observations and conclusions upon what passed in court, which contained an insinuation that the plaintiff had committed *perjury:* and it is no justification to such insinuation of perjury against the plaintiff (who had sworn to an assault by *A. B.* on him,) that it *did appear* (which was the suggestion in the libel) *from the testimony of every person in the room*, &c. *except the plaintiff*, that no violence had been used by *A. B.* &c.; for non constat, thereby that what the plaintiff swore was false. Neither is it sufficient in a justification to such a libel, where the extraneous matter was so mingled with the judicial account as to make it uncertain whether it could be separated, to justify the publication by general reference to *such parts of the supposed libel as purport to contain an account of the trial*, &c., and that the *said parts* contain a just and faithful account of the trial, &c. *Stiles* v. *Nokes, T.* 46 G. 3. 493

JURISDICTION.

See CONVICTION, No. 1. COURTS. SEWERS, No. 1.

It seems that a *stock broker* is liable to pay to the Chamberlain of *London*, for the benefit of the corporation, the annual duty of 40*s.* directed by stat. 6 *Ann.* c. 16. *s.* 4. to be received by the Chamberlain from every *broker*. But at all events if the Chamberlain sue for such duty in the *London* Court of Requests, and that Court decline taking cognizance of the suit, on the ground that the corporation, for whose benefit the duty was to be received, had taken a *bond* in the penal sum *of* 10*l.* (the Court having jurisdiction only to the extent of 5*l.*) from the broker, upon which he might be sued in the superior courts; and that the Judges of the Court of Requests were freemen of the corporation interested in the suit; this Court will grant a mandamus to the commissioners to proceed therein; for under the statute of *Anne* their chamberlain is *a trustee* for the corporation; and a bond taken by them in their own name for securing the 40*s.* duty is no merger of the ordinary remedy given to their chamberlain by the legislature: neither is the right of the chamberlain to sue in the Court of Requests, which has always been the practice, affected by the scintilla of interest which any of the commissioners might be supposed to have as corporators in the duty to be recovered; though it did not appear that *all* of them had such interest. *The King* v. *The Commissioners of the London Court of Requests. H.* 46 G. 3. 292

JURY,

See SEWERS.

LANDLORD AND TENANT,

See LEASE.

1. The lessor, after a demise of certain premises with a portion of an adjoining yard, covenanted that the lessee should have "the *use* of the pump in the yard jointly with himself, *whilst the same should remain there*, paying half the expences of the repair." The words *whilst*, &c. reserve to the lessor a power of removing the pump at his pleasure; and it is no breach of the covenant though he remove it without reasonable cause, and in order to injure the lessee. But without those words it would have been a breach of covenant to have removed the pump. *Rhodes* v. *Bullard, H.* 46 G. 3. 116
2. Where assignees of a bankrupt advertised the lease of certain premises, of which the bankrupt was lessee, for sale by auction, (without stating themselves to be the owners or possessed thereof,) and no bidder offering, they never took possession in fact of the premises; held that

that this was no more than an experiment to ascertain the value, whether the lease were beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term ; nor support an averment in a declaration in covenant against them by the landlord, that all the estate, right, title, interest, &c. of the bankrupt in the premises came *to the defendant by assignment thereof.* *Turner* v. *Richardson and another, Assignees of Barber, a Bankrupt, E.* 46 G. 3. 335

3. But in an action for use and occupation brought against the assignee of a bankrupt to whom a house was let, proof that the landlord had applied to the assignee after the bankruptcy to know if he meant to take the bankrupt's interest in the house ; to which the assignee answered, that if he did not let it by *Ladyday* he would give it up : and he afterwards accordingly paid up the rent to that day, and offered the key, Lord *Kenyon*, C. J. held him liable. *Broome* v. *Robinson, at Westminster, Dec.* 1800. 339

4. In ejectment upon a clause of re-entry in a lease on non-payment of rent against the assignee of the lease, proof by the lessor of the counter-part of the lease, by the subscribing witness, is sufficient proof of the holding upon the condition of re-entry in case of non-payment of rent. And where the witness who proved the demand of the rent had a power of attorney from the lessor for that purpose, which he notified to the tenant, and had ready to produce ; held sufficient, though he did not produce it at the time of the demand ; the tenant not questioning his authority. *Rowe d. West* v. *Davis, E.* 46 G. 3. 363

5. The Court will not, *after* a trial, stay the proceedings on payment of the rent, &c. : the stat. 4 G. 2. *c.* 28. only warranting such application *before* trial. And that statute is not confined to cases of ejectment brought after half a year's rent due *where no sufficient distress was to be found on the premises. ib.*

LEASE.

See EVIDENCE, No. 7. LANDLORD AND TENANT.

One in consideration of 5*l.* 8*s.* in nature of a fine, and of a yearly rent of 5*s.* 9*d.*, demised certain ground, with the buildings, &c. for 21 years, with a proviso for distress if the rent were in arrear for 14 days. And the lessor covenanted at the end of 18 years of the term, or before, on request of the lessee, to grant a new lease of the premises " for the like fine, for the like term of 21 years, at the like yearly rent, *with* ALL *covenants, grants, and articles as in that indenture were contained ;*" held that this covenant was satisfied by the tender of a new lease for 21 years containing *all* the former covenants *except the covenant for future renewal.* And held that an averment, that the covenant for renewal in the indenture declared on corresponded with *various other leases*, before then successively made by the owners of the inheritance, for the time being, could not be taken in aid to construe the meaning of the indenture : for supposing such evidence were admissible in any case where the renewals had been uniformly the same, yet non constat from this averment that *all* the former leases contained the same covenant for renewal. *Iggulden* v. *May, H.* 46 G. 3. 237

LIBEL.

See EVIDENCE, No. 1.

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thereby that what the plaintiff swore was false. Neither is it sufficient in a justification to such a libel, where the extraneous matter was so mingled with the judicial account as to make it uncertain whether it could be separated, to justify the publication by general reference to *such parts of the supposed libel as purport to contain an account of the trial*, &c. and that the *said parts* contain a just and faithful account of the trial, &c. *Stiles* v. *Nokes*, T. 46 G. 3. 493

LICENCE TO OFFICIATE,

See MANDAMUS, No. 3. 6.

LIEN.

1. Where a broker pledges the goods of his principal as his own, the pawnee who claims by such tortious act of the broker cannot claim to retain against the principal in trover for the amount of the lien which the broker had on the goods for his general balance at the time of such pledge. It may be otherwise, where one who has a lien delivers the goods to a third person as a security, with notice of his lien, and appoints him to continue his possession, as his servant, for the preservation of his lien. *M'Combie* v. *Davies*, M. 46 G. 3. 5

2. Where no lien exists at common law, it can only arise by contract with the particular party, either express or implied: it may be implied either from previous dealings between the same parties upon the footing of such a lien, or even from a usage of the trade so general as that the jury must reasonably presume that the parties knew of and adopted it in their dealing. But where, as in the case of a common carrier claiming a lien for his general balance, such a lien is against the policy of the common law and the custom of the realm, which only gives him a lien for the carriage price of the particular goods, there ought to be very strong evidence of a general usage of such a lien, to induce a jury to infer the knowledge and adoption of it by the particular parties in their contract; and the jury having negatived such a general usage, though proved to have been frequently exercised by the defendants and various other common carriers throughout the North for 10 or 12 years before, and in one instance so far back as 30 years, and not opposed by other evidence, the Court refused to grant a new trial. *Rushforth and others, Assignees of Rushforth*, v. *Hadfield and others*, H. 46 G. 3. 224

LIMITATION OF TIME *for ascertaining a Right,*

See WEIR, OF ACTION ON THE CASE, No. 1.

LONDON—*Court of Requests.*

It seems that a *stock-broker* is liable to pay to the Chamberlain of *London*, for the benefit of the corporation, the annual duty of 40*s.* directed by stat. 6 *Ann.* c. 16. *s.* 4. to be received by the Chamberlain from every broker. But at all events if the Chamberlain sue for such duty in the *London* Court of Requests, and that Court decline taking cognizance of the suit, on the ground that the corporation, for whose benefit the duty was to be received, had taken a bond in the penal sum of 10*l.* (the Court having jurisdiction only to the extent of 5*l.*) from the broker, upon which he might be sued in the superior courts, and that the judges of the Court of Requests were freemen of the corporation interested in the suit; this Court will grant a mandamus to the commissioners to proceed therein; for under the stat. of *Anne*, their Chamberlain is a trustee for the corporation, and a bond taken by them in their own name for securing the 40*s.* duty is no merger of the ordinary remedy, given to their Chamberlain by the legislature. Neither is the right of the Chamberlain to sue in the Court of Requests, which has always been the practice, affected by the scintilla of interest which any of the commissioners might be supposed to have as corporators in the duty to be recovered; though it did not appear that all of them had such interest.

The

The King v. *The Commissioners of the Court of Requests in the City of London*, *H.* 46 G. 3. 292

LONDON—*Court of Conscience.*

1. Attornies, *plaintiffs*, are not within the *London* court of conscience act 39 and 40 G. 3. *c.* 104. compellable to sue there for a debt under 5*l.* at the peril of costs. *Board* v. *Parker*, *M.* 46 G. 3. 47
2. Neither are they, though the defendant were also an attorney. *Hodding* v. *Warrand*, *M.* 46 G. 3. 50

MALT ACT.

See CONVICTION, No. 1, 2.

MANDAMUS.

See INSOLVENT DEBTORS, No. 2.

1. A mandamus to commissioners of bankrupt, to certify the bankrupt's conformity to the Lord Chancellor, refused, *In the matter of John King*, *M.* 46 G. 3. 92
2. It seems that a *stock-broker* is liable to pay to the Chamberlain of *London*, for the benefit of the corporation, the annual duty of 40*s.* directed by stat. 6 *Ann. c.* 16. *s.* 4. to be received by the Chamberlain from every broker. But at all events, if the Chamberlain sue for such duty in the *London* Court of Requests, and that Court decline taking cognizance of the suit, on the ground that the corporation, for whose benefit the duty was to be received, had taken a bond in the penal sum of 10*l.* (the Court having jurisdiction only to the extent of 5*l.*) from the broker, upon which he might be sued in the superior courts; and that the Judges of the Court of Requests were freemen of the corporation interested in the suit; this Court will grant a mandamus to the commissioners to proceed therein; for under the statute of *Anne*, their Chamberlain is a trustee for the corporation; and a bond taken by them in their own name for securing the 40*s.* duty is no merger of the ordinary remedy given to their Chamberlain by the legislature. Neither is the right of the Chamberlain to sue in the Court of Requests, which has always been the practice, affected by the scintilla of interest which any of the commissioners might be supposed to have as corporators in the duty to be recovered; though it did not appear that *all* of them had such interest. *The King* v. *The Commissioners of the London Court of Requests*, *H.* 46 G. 3. 292
3. In a writ of mandamus such facts should be alleged as are necessary to shew that the party applying for it is entitled to the relief prayed. Therefore where a mandamus to the ordinary to license a curate or chaplain only stated that he had been *duly nominated and appointed by the inhabitants* of a township to be curate or chaplain of the church of *P.*; without stating either the consent of the rector, or any endowment or custom for the inhabitants to make such nomination and appointment, the Court quashed the writ. *The King* v. *The Bishop of Oxford*, *E.* 46 G. 3. 345
4. Where a corporator, who was entitled to divide a certain share of the profits of a fishery, which the corporators worked and enjoyed in partnership, was *suspended* from the perception of his profits until he paid a certain fine imposed by a by-law, with the breach of which he was charged; the Court refused a mandamus *to restore him to his office*; he being still an officer, and having a remedy by an action for the tort against any who disturbed him in the lawful perception of his profits, (if the by-law were illegal, or he were not guilty of a breach of it, or had been unlawfully suspended:) or, considering the corporators as *partners* in the fishery, he having a remedy in equity for his share of the partnership funds unjustly withholden from him. *The King* v. *The Company of Free Fishers and Dredgers of Whitstable*, *Kent*, *E.* 46 G. 3. 353
5. Mandamus to the Commissary of the Bishop of *Winchester*, &c. to swear and admit one into the office of church-warden

warden by the inhabitants, &c. *vide* ELECTION.

6. A chapel in the township of *P.* was endowed in 1428, by a deed executed by the then impropriator of the rectory, the then vicar, and the inhabitants of the township, and confirmed by the diocesan, whereby in consideration of a yearly payment to the vicar, it was provided that the curate of the chapel should receive all the tithes due to the vicar from the said inhabitants, and should be appointed by them: under which deed they continued to exercise the power of appointment and presentation. In 1797 an act passed for inclosing open lands in the township, in which it is stated as a matter of doubt, whether the curate were entitled to the small tithes or to a modus in lieu of tithes, the decision of which is left untouched by the act. In 1801, upon a vacancy, the inhabitants appoint and present a curate, upon an agreement signed by him and the principal inhabitants, wherein they state that he is appointed to the curacy, &c. and *to the money payment of* 40*l.* 8*s.* 2*d. annually payable out of the lands and hereditaments in* P. in right of the said curacy, together with surplice fees and *all other profits, privileges, and appurtenances to the same belonging and of right payable:* that the inhabitants considering that sum not sufficient for the proper support of the curate, had *voluntarily* agreed with him to pay a further annual sum of 29*l.* 11*s.* 10*d.* with a *proviso* that it "shall not in any respect alter the money payment of 40*l.* 8*s.* 2*d. wherewith the said lands are and have been* TIME IMMEMORIAL *charged in right of the said church.*" Held that this agreement, entered into for the purpose of restraining the then curate from asserting his claim to the small tithes by due course of law, and furnishing evidence against his successors was *simoniacal,* and the presentation made thereon void. And the right of presentation having thereupon devolved upon the crown by stat. 31 *Eliz.* c. 6. *s.* 5., whose presentee had been licensed by the ordinary, a mandamus to the ordinary to license another curate subsequently appointed and presented by the inhabitants, who had given notice of having withdrawn their former nomination and presentment, and cancelled the agreement, was denied; and the rule was discharged with costs. *The King* v. *The Bishop of Oxford, T.* 46 G. 3. 600

MERGER.

It seems that a *stock-broker* is liable to pay to the Chamberlain of *London,* for the benefit of the corporation, the annual duty of 40*s.* directed by stat. 6 *Ann. c.* 16. *s.* 4. to be received by the Chamberlain from every broker. But at all events, if the Chamberlain sue for such duty in the *London* Court of Requests, and that Court decline taking cognizance of the suit, on the ground that the corporation, for whose benefit the duty was to be received, had taken a bond in the penal sum of 10*l.* (the Court having jurisdiction only to the extent of 5*l.*) from the broker, upon which he might be sued in the superior courts: and that the Judges of the Court of Requests were freemen of the corporation interested in the suit; this Court will grant a mandamus to the commissioners to proceed therein: for under the statute of *Anne,* their Chamberlain is a *trustee* for the corporation; and a bond taken of them in their own name for securing the 40*s.* duty is no merger of the ordinary remedy given to their Chamberlain by the legislature. Neither is the right of the Chamberlain to sue in the Court of Requests, which has always been the practice, affected by the scintilla of interest which any of the commissioners might be supposed to have as corporators in the duty to be recovered, though it did not appear that *all* of them had such interest. *The King* v. *The Commissioners of the London Court of Requests, H.* 46 G. 3. 292

MISNOMER—*Parish,*

See POOR REMOVAL, No. 2.

NAVIGATION-LAWS,

See Colonial Produce, *or* Insurance, No. 5.

NOTICE TO QUIT,

See Ejectment, No. 5.

NUISANCE,

See Weir.

OCCUPANT.

There can be no general occupancy of a copyhold, because the freehold is always in the lord; and the statutes 29 *Car.* 2. *c.* 3. *s.* 12, and 14 *G.* 2. *c.* 20. *s.* 9., appropriating estates pur autre vie where there is no special occupant, do not extend to copyholds. And one who was admitted tenant upon a claim as administrator de bonis non to the grantee of a copyhold pur autre vie, having no title in such character, cannot recover in ejectment by virtue of such admission as upon a new and substantive grant of the lord. *Zouch dem. Forse* v. *Forse, H.* 46 G. 3. 186

OFFICE,

See Settlement—*by Office.*

Where a corporator, who was entitled to divide a certain share of the profits of a fishery, which the corporators worked and enjoyed in partnership, was *suspended* from the perception of his profits until he paid a certain fine imposed by a by-law, with the breach of which he was charged: the Court refused a mandamus to *restore him to his office*; he being still an officer, and having a remedy by an action for the tort against any who disturbed him in the lawful perception of his profits, (if the by-law were illegal or he were not guilty of a breach of it, or had been unlawfully suspended;) or, considering the corporators as *partners* in the fishery, he having a remedy in equity for his share of the partnership funds unjustly withholden from him. *The King* v. *The Company of Free Fishers and Dredgers of Whitstable, Kent, E.* 46. G. 3. 353

OFFICER.

One who was appointed collector of the Property-tax by the proper constituted authorities, and who considered himself and was considered by the commissioners to be such collector, but whose appointment turned out to have been informally made, cannot be indicted at common law for the receipt of duties *by colour and pretence of being collector* of such duties; though the money were fraudulently collected and misapplied by him; because he was *in fact* appointed collector, and in that character received the money. And quære whether the stat. 43 *G.* 3. *c.* 99. *s.* 19. having enacted that no collector, &c. employed in the execution of that act shall be liable by reason of such execution to any *penalty* other than such as by that and another act may be inflicted, does not take away the common law remedy by indictment for offences against the act. *The King* v. *Dobson and Another, H.* 46 G. 3. 218

ORDER OF REMOVAL,

See Poor-Removal.

OUTLAWRY,

See Pleading, No. 1.

OVERSEERS OF THE POOR,

See Poor, *Overseers of.*

OYER.

As by the practice of the Court they will not grant oyer of an original writ, and yet a plea in abatement for want of an addition to the defendant in such writ is bad without oyer; the effect is to prevent such a plea from being pleaded; and therefore if pleaded the Court will quash it. *Deshons* v. *Head, E.* 46 G. 3. 383

PARISH—*Name.*

See Poor-Removal, No. 2.

PARISH

PARISH OFFICE.

A certificate granted by the Judge at the assizes, upon the apprehension and conviction of a burglar, exempting the prosecutor and his assignee from "all and all manner of *parish* and ward offices," exempts the party from serving the office of *petty constable* for a township within, but not co-extensive with, the parish where the felony was committed, and for which the certificate was granted; to which office he was appointed at the court-leet of the manor co-extensive with such township. *Moseley, Bart.* v. *Stonehouse, H.* 46 G. 3. 174

PARISH-OFFICERS.

See Poor—*Overseers of.*

PARTNERS.

A., B., and C., trading under the firm of A. and B., in the *cotton* business; C. not being known to the world as a partner; and A. and B. traded as partners alone under the same firm in the business of *grocers;* in which latter business they became indebted to D. and gave him their acceptance; which not being able to take up when due, they, in order to provide for it, indorsed in the common firm of A. and B. a bill of exchange to D. which they had received in the *cotton* business in which C. was interested; but such indorsement was unknown to C. of whom D. the indorsee had no knowledge at the time. Held that such indorsement in the firm common to both partnerships of a bill received by A. and B. in the *cotton* business bound C. their secret partner in that business, and that consequently C. was liable to be sued by D. on such indorsement; the latter not knowing of the misapplication of the partnership fund at the time. *Swan and others* v. *Steele, Clerk and Wood, H.* 46 G. 3. 210

PAYMENT OF DEBT.

Payment of the debt, without knowledge of an action then commenced or costs incurred, is no defence at the trial. *Toms* v. *Powell, T.* 36 G. 3. 536

PENAL ACTION.

Assuming it to be necessary in an action for a penalty by a common informer that the Court should refer to the statute *giving the remedy*, as well as to that *creating the offence and giving the penalty;* yet a count for a penalty on the stat. 5 *Ann. c.* 14, stating that the defendant kept a snare to kill game *against the form of the statute in such case made*, &c. by reason *whereof*, and *by force of the statute* in such case made, &c., is sufficient; for the first statute mentioned refers to the 5 *Ann. c.* 14. creating the offence and giving the penalty; and the statute lastly mentioned refers to the 2 *Geo.* 3. *c.* 19. whereby the *whole* penalty is given to the common informer, the half only of which had been given to him by an intervening statute. *The Earl of Clanricarde* v. *Stokes, T.* 46 G. 3. 516

PENALTY.

Quære, Whether the stat. 43 G. 3. *c.* 99. *s.* 19. having enacted that no collector, &c. employed in the execution of that act shall be liable by reason of such execution to any *penalty* other than such as by that and another act may be inflicted, does not take away the common law remedy by indictment for offences against the acts. *The King* v. *Dobson, H.* 46 G. 3. 218

PLANTATIONS.

Colonial produce cannot legally be shipped from the *British West Indies* for *Gibraltar*, and therefore the same cannot be insured on such a voyage. And it matters not that part of the cargo was shipped at one *West India* island, with liberty to exchange it at another (which would have been legal,) if in fact it were not exchanged, and its ultimate destination was *Gibraltar*. And the ship and cargo being lost off *Gibraltar*, though the assured could not recover, yet the premium having been paid upon an illegal insurance could not

be recovered back. *Lubbock* v. *Potts*, *T.* 46 G. 3. 449

PLEADING.

1. An allegation that a co-defendant was "by due course of law outlawed at the suit of the plaintiff in this plea and suit" is sufficient without a *prout patet per recordum*. *Carmichael* v. *Johnson*, *M.* 46 G. 3. 50
2. It is a good plea to an action on a promissory note and for money lent, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay to them the money claimed by the plaintiff: and it is no good replication that the causes of action accrued after the plaintiff became bankrupt, and that the defendant treated with the plaintiff as a person capable of receiving credit in those behalves; and that the commissioners had made no new assignment of the said notes and money; for the general assignment of the commissioners passes to the assignees of the bankrupt all his *after*-acquired as well as present personal property and debts. *Kitchen* v. *Bartsch*, *M.* 46 G. 3. 53
3. To debt on a bail-bond, it is no good plea that the action was brought by the sheriff for the benefit of and as trustee for the sheriff's officer, who arrested the defendant, and to whom the defendant paid the debt and costs, &c. after the return-day, but *before the sheriff was ruled to return the writ*, and who accepted the money so paid by the defendant, *in full satisfaction and discharge of the bail-bond and fees*, &c.; and that if any damage were afterwards incurred for default of defendant's appearance according to the condition of the bond, it was occasioned by the default of such sheriff's officer in not paying over the debt and costs to the plaintiff in the original action, which would have been accepted by such plaintiff, &c.: for it does not thereby appear that the sheriff's officer had either a *legal* or an *equitable* interest (even supposing the latter would have sufficed in the bond *at the time of the supposed satisfaction* received by such officer; and supposing that accord and satisfaction could be pleaded to such a bond, not for *money*, but for a *collateral* act; and supposing that it could be so pleaded *after* the day stipulated for performance of the act. *Scholey* and *Domville* v. *Mearns*, *H.* 46 G. 3. 148
4. An averment in covenant that the covenant for renewal in the indenture declared on corresponded with various other leases, before then successively made by the owners of the inheritance for the time being, cannot be taken in aid to construe the meaning of the indenture; for supposing such evidence were admissible in any case where the renewals had been uniformly the same yet non constat from this averment that all the former leases contained the same covenant for renewal. *Iggulden* v. *May*, *H.* 46 G. 3. 237
5. As by the practice of the Court they will not grant oyer of an original writ, and yet a plea in abatement for want of an addition to the defendant in such writ is bad without oyer; the effect is to prevent such a plea from being pleaded; and therefore if pleaded the Court will quash it. *Deshons* v. *Head*, *E.* 46 G. 3. 383
6. It is not sufficient in justifying a libel (containing a highly coloured account of judicial proceedings, mixed with libellous insinuations and observations of the party himself) where the extraneous matter was so mingled with the judicial account as to make it uncertain whether it could be separated, to justify the publication by general reference to *such parts of the supposed libel as purport to contain an account of the trial*, &c., and that the *said parts* contain a just and faithful account of the trial, &c. *Stiles* v. *Nokes*, *T.* 46 G. 3. 493
7. Assuming it to be necessary in an action for a penalty by a common informer that the count should refer to the statute *giving the remedy*, as well as to that *creating the offence and giving the penalty*: yet a count for a penalty on the stat. 5 *Ann. c.* 14. stating that the defendant

defendant kept a snare to kill game, *against the form of the statute* in such case made, &c. by reason *whereof*, and *by force of the statute* in such case made, &c. an action hath accrued, &c. is sufficient. For the first statute mentioned refers to 5 *Ann. c.* 14. creating the offence and giving the penalty; and the statute lastly mentioned refers to the 2 *Geo.* 3. *c.* 19. whereby the whole penalty is given to the common informer, the half only of which had been given to him by an intervening statute. *The Earl of Clanricarde* v. *Stokes*, *T.* 46 G. 3. 516

PLEDGE.

Where a broker pledges the goods of his principal as his own, the pawnee who claims by such tortious act of the broker cannot claim to retain against the principal in trover for the amount of the lien which the broker had on the goods for his general balance at the time of such pledge. It may be otherwise, where one who has a lien delivers the goods to a third person as a security, with notice of his lien, and appoints him to continue his possession as his servant, for the preservation of his lien. *M'Combie* v. *Davies*, *M.* 46 G. 3. 5

PLENE ADMINISTRAVIT.

An executor administering, having once received money, assets of his testator, cannot discharge himself under the plea of plene administravit to an action by a bond creditor of his testator, by shewing that he paid the money over to his co-executor, even for the purpose of satisfying the bond creditor, who had applied for payment to such co-executor, if the co-executor afterwards misapplied the money by retaining it to satisfy his own simple contract debt. *Cross et Uxor, Administratrix of Reed*, v. *Smith and Munt, Executors of Grierson*, *H.* 16 G. 3. 246

POOR, OVERSEERS OF.

1. Though a parish had at no time antecedent to the years 1773-5 had the benefit of the stat. 43 *Eliz. c.* 2. but had always had *five* overseers of the poor appointed separately, two for one district, two for another, and one for the third; yet two of the districts having agreed in 1773 to act together, to which the third acceded in 1775, and there having been but four overseers since that period, who had been appointed for the whole parish; the Court held that such agreement at the time, acted upon for 30 years past, was proper evidence for the jury to decide that the parish could in fact enjoy the benefit of the stat. 43 *Eliz.* and consequently that a distress levied for a poor rate made by the overseers conjointly appointed for the whole parish was legal. *Lane* v. *Cobham*, *M.* 46 G. 3. 1
2. Whether or not a parish can have the benefit of the stat. 43 *Eliz. c.* 2.; by maintaining its poor with not more than four overseers, is a fact which the Sessions ought to find and should not leave to be presumed by the Court from other conflicting evidence stated in a case reserved; such as that the parish had the benefit of the statute down to 1739, and from thence to 1753 it was uncertain how the poor were maintained there, and that from the latter period the poor had been maintained separately in six townships; but that the population was decreased. *Rex* v. *Watson*, *H.* 46 G. 3. 214

POOR-RATE,

See POOR, OVERSEERS OF,

POOR-REMOVAL,

See APPEAL.

1. An order of removal of *J. S.* and *B.* his wife, *made upon the examination of the wife*, adjudging that they lately came into the parish of *K.* and *are* likely to become chargeable to it, and *were*

last legally settled in *M.*, is good upon the face of it, and conclusive upon the parish of *M.* as to the marriage and settlement of the husband and wife; so that upon a subsequent removal of the wife, describing her as *B. M., single woman,* from *M.* to *B., S.* cannot shew in evidence that the marriage was null and void. *The King* v. *The Inhabitants of Binegar, E.* 46 G. 3. 377

2. An order of removal, directed to "the *parish of Poole,* or *town and county of Poole,*" is sufficient; though the proper name of the parish be *St. James in Poole;* there being no other parish in the town and county of *Poole. The King* v. *The Inhabitants of Topsham, T.* 46 G. 3. 466

POWER,

See EVIDENCE, No. 7.

Under a devise to *A.* for life, remainder to trustees, &c., remainder to the use of *the issue of the body of A.*, "in such parts, shares, and proportions, *manner and form* as she should appoint;" remainder in default of appointment, to the use of all and every the children of *A.* and their heirs, &c. *A.* has a power of appointing to all or any of her children *in fee,* and is not restrained to appoint to them *in tail only. Rex* v. *The Marquis of Stafford and others, T.* 46 G. 3. 521

PRACTICE,

See BAIL.

1. Though a writ of error abate by the death of the plaintiff in error before it be returned and certified, yet execution cannot afterwards be issued on the judgment without leave of the Court; and the Court refused leave for the plaintiff here to issue a testatum fi. fa. tested in the last term on the return day of the original fi. fa., which was after the allowance and service of the writ of error. *Lord Kinnaird and others* v. *Lyall, H.* 46 G. 3. 296

2. A defendant superseded for want of being charged in execution within two terms *after* judgment, cannot be again arrested and taken in execution upon the same judgment. Aliter, if superseded for want of proceedings in time *before* judgment. *Line* v. *Lowe, H.* 46 G. 3. 330

3. It is sufficient in a *qui tam* action to entitle the plea with the names of the parties, without the addition of *qui tam,* &c. to the plaintiff's name, *Dale, qui tam,* v. *Beer, H.* 46 G. 3. 333

4. The Court will not, *after* a trial, stay proceedings in ejectment on payment of the rent, &c.; the stat. 4 *G.* 2. *c.* 28. only warranting such application *before* trial. And that statute is not confined to cases of ejectment brought after half a year's rent due *where no sufficient distress was to be found on the premises. Roe d. West* v. *Davis, E.* 46 G. 3. 363

5. As by the practice of the Court they will not grant oyer of an original writ, and yet a plea in abatement for want of an addition to the defendant in such writ is bad without oyer; the effect is to prevent such a plea from being pleaded; and therefore if pleaded the Court will quash it. *Deshons* v. *Head, E.* 46 G. 3. 383

6. The defendant, a seaman, being out upon bail on process for a debt under 20*l.*, was impressed into the king's service; and as he would have been entitled to his discharge, if in custody, by virtue of the stat. 32 G. 3. *c.* 33. *s.* 22. the Court on application of the bail ordered an exoneretur to be entered on the bail-piece in the first instance. *Robertson* v. *Paterson, T.* 46 G. 3. 405

7. The Court will discharge a married woman on filing common bail, who was sued for goods sold and delivered to her by the plaintiff; knowing at the same time that she was a married woman, though living apart from her husband with a separate maintenance. *Wardell* v. *Gooch, T.* 46 G. 3. 582

8. After default made in not putting in special bail in time, it is not enough that

that bail are afterwards *put in:* but the plaintiff may take an assignment of the bail bond and proceed thereon, unless the bail be also *justified*, though not before excepted to. *Turner* v. *Cary and others*; *T.* 46 G. 3. 607

9. Where parties by bond agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of court, it is competent to either, even since the stat. 9 & 10 *W.* 3. *c.* 15. to revoke by deed his submission, and notify the same to the arbitrators before the authority be executed: and he cannot be attached for a contempt of court if after such revocation and notice the arbitrators make an award, and the submission be made a rule of court. But it seems that it would be a contempt to revoke the submission after it had been made a rule of court. *Milne and others, Assignees of Rhodes and another, Bankrupts*, v. *Gratrix*, *T.* 46 G. 3. 608

10. Where the debt was paid after an alias pluries writ issued, the defendant cannot object at the trial that the latitat was not returned; for at any rate if the alias pluries were the commencement of the action, it is only an irregularity, which, though a ground for application to the Court to set aside the proceedings, yet having been once waved, cannot afterwards be objected to. Neither can it be objected at the trial that when the debt was paid the defendant had no notice of any action commenced or costs incurred. *Toms* v. *Powell*, *T.* 46 G. 3. 536

11. The plaintiff is not bound to notice an order for time to plead obtained by the defendant, if it be not drawn up and served; but may sign judgment as for want of a plea after the time when the defendant would have been bound to plead if no such order had been made. *Sedgewick* v. *Allerton*, *T.* 46 G. 3. 512

12. One who was residing at an hotel in *London* from the time of his arrest till he was served with notice of executing the writ of inquiry was holden not entitled to more than eight days' notice in a town cause, though his general residence (his home) was above 40 miles from town. *Lloyd* v. *Hooper*, *T.* 46 G. 3. 624

PRESUMPTION,

See CONVICTION, No. 1. WEIR.

The Sessions presumed that an indenture of apprenticeship executed 30 years before, and under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, and proved to be lost, and when the parish in which he was settled under such indenture had relieved him for the last 12 years, was properly stamped in proportion to the apprentice fee of 12*l.* received by the master; although the deputy registrar and comptroller of the stamp duties proved that it did not appear in the office that any such indenture had been stamped or inrolled during that period: and the judgment of the justices was confirmed in *B. R. The King* v. *The Inhabitants of Long Buckby*, *M.* 46 G. 3. 45

PROPERTY-TAX,

See INDICTMENT, No. 1.

PUBLICATION,

See EVIDENCE, No. 1.

PROMOTIONS.

1. The Hon. *Thomas Erskine* made Lord High Chancellor, and created a peer by the title of Lord *Erskine*, &c. *H.* 46 G. 3. 335

2. *Arthur Pigott*, Esq. made Attorney-General, and knighted. *ib.*

3. *Samuel Romilly*, Esq. made Solicitor-General, and knighted. *ib.*

4. Mr. *Jervis*, made King's Counsel. *ib.*

5. Serjts. *Lens* and *Best* made King's Serjeants, *E.* 46 G. 3. 335

6. Mr. *Hargrave* made King's Counsel. *ib.*

7. Mr. *Dauncey* had a Patent of Precedence. *ib.*

QUI TAM.

It is sufficient in a *qui tam* action to entitle the plea with the names of the parties, without the addition of *qui tam*, &c. to the plaintiff's name. *Dale, qui tam*, v. *Beer, H.* 46 G. 3. 333

RATE—*Poor,*

See POOR, OVERSEERS OF.

REASONABLE TIME.

What is such is a question of law to be left to the jury under the circumstances. *Anderson* v. *The Royal Exchange Assurance Company, M.* 46 G. 3. 58

REMOVAL, ORDER OF,

See POOR-REMOVAL.

REVOCATION, DEED OF,

See AWARD, No. 2.

RIVER,

See WEIR.

SALVAGE,

See INSURANCE, No. 1.

SESSIONS,

See EVIDENCE, No. 5.

SALE OF GOODS—*By Sample.*

Sugars, which were in the king's warehouse under the locks of the king and the owner, from whence they could not be removed till the duties were paid, were advertised for sale by auction on the 20th of *September*, when *samples* of half a pound weight from each hogshead, drawn *after* the sugars had been weighed and the duties ascertained at the king's beam, were produced to the bidders assembled: and the auctioneer, (having then before him the *printed catalogue* of sale, containing the lots, marks, and number of hogsheads, and the gross weight of the sugars, and also another written paper, containing the *conditions of sale*, which latter he *read* to the bidders, as the conditions on which the sugars mentioned in the *catalogue* were to be sold; *but the two papers were neither externally annexed, nor contained any internal reference to each other,*) wrote down on the *catalogue* the name of the highest bidder and the sum bid for the particular lots; having first informed the bidders that the duties were not then paid, but would be paid on the morrow by the seller; and after the biddings closed *the samples were delivered to and accepted by the purchaser*, according to the usual practice at such sales, *as part of his purchase, to make up the quantity marked as weighed* at the king's beam. And a fire having consumed the sugars on the 22d of *September*, before the duties could be paid, and *without the default of the seller*: held,

1st, That at common law this was a sale to change the property at the time and place of auction, though the goods could not be delivered till the duties were paid, which was known at the time; such being the manifest intent of the contracting parties; and consequently that the loss must fall upon the buyer.

2dly, That assuming a sale of goods by auction to be within the 17th section of the statute of frauds, 29 *Car.* 2. c. 3. (which, whether it were or not was not now necessary to be decided,) and therefore requiring to be evidenced by a memorandum in writing of the bargain, signed by the party to be charged or his authorised agent, except where the buyer shall receive part of the goods sold; yet here the delivery to and acceptance of the *samples* by the buyer; which delivery was made as part of the thing purchased, and upon which the duties were paid; at any rate took the case out of the statute.

3dly, It seems that taking sales of goods by auction to be within the 17th section of the statute, the auctioneer or broker, who is a middle-man, must be taken

taken to by the agent of both parties, so as to bind the purchaser by his signature. *Hinde* v. *Whitehouse and Galan*, T. 46 G. 3. 558

SAMPLE, SALE BY,

See SALE OF GOODS.

SEAMAN,

See BAIL, No. 1.

SESSIONS,

See APPEAL.

SETTLEMENT—*By Apprenticeship.*

1. The Sessions presumed that an indenture of apprenticeship executed 30 years before, and under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, and proved to be lost, and when the parish in which he was settled under such indenture had relieved him the last 12 years, was *properly stamped* in proportion to the apprentice fee of 12*l.* received by the master; although the deputy registrar and comptroller of the stamp-duties proved that it did not appear in the office that any such indenture had been stamped or enrolled during that period. And the judgment of the justices was confirmed in *B. R. The King* v. *The Inhabitants of Long Ditton*, M. 46 G. 3. 45

2. The residence of an apprentice with his grandmother in a different parish from his master on account of illness, though with the consent of the master, is not referable to the apprenticeship, so as to gain him a settlement in such third parish. *The King* v. *The Inhabitants of Bramley-in-the Marsh*, E. 46 G. 3. 341

3. An apprentice to a ship-owner living at *A.* gains a settlement by residing on board his master's ship for forty days in *B.*, while the ship was lying and trading on the coast, in the course of his master's trade and employ, upon a coasting voyage. And if the apprentice afterwards, upon the bankruptcy of his master, return to *A.* where he formerly resided with his master as at his home, and finding that his master had absconded, live there with a relation, without doing any further service there for his master; such residence, though for more than 40 days before his apprenticeship expired, will not regain him a settlement in *A.* *The King* v. *The Inhabitants of Topsham*, T. 46 G. 3. 466

SETTLEMENT—*By Hiring and Service.*

1. A pauper placed by the parish with a parishioner, upon an agreement between the latter and the parish officers to find board, washing, and lodging for the pauper at 2*s.* 6*d.* per week, and that the pauper was to do what he was set about, does not constitute the relation of master and servant, between such parishioner and the pauper, so as to enable the latter to gain a settlement as by hiring and service. Neither does such relation arise by implication from a continuance of services to the parishioner by the pauper who continued to live with him as before, after the parish had refused any longer to continue the parochial allowance; and the pauper who was a *Greenwich* pensioner, going there twice a year, without asking or receiving the leave of the parishioner; the latter, however, not refusing leave when informed of the other's going. *The King* v. *The Inhabitants of Rickinghall Inferior*, E. 46 G. 3. 373

2. The pauper desired her mother to look out for a place for her; and the mistress on the application of the mother some time before *Old Michaelmas* said that she would give the pauper the same wages as her other servants, and wait till she came; but the mother made no absolute agreement for her daughter: though she informed her that she had got a place for her at [illegible]. A week after *Old Michaelmas* the mistress applied to the pauper to know if she liked

liked to come into her service, and they then agreed for the first time for certain yearly wages, (the same as the other servants,) *with liberty of parting at a month's wages or warning*, Held, that the hiring commenced only from the day when the pauper and her mistress agreed on the terms specified, and not from *Old Michaelmas* or before, when the mother spoke to the mistress. And the pauper having given a month's previous notice to quit at *Old Michaelmas-day*; which the mistress accepted, and procured another servant to come on that day; when the pauper received her whole year's wages; but upon the mistress telling her that she wanted a week of serving out her year, she offered to stay another week; to which the mistress said that it did not signify, as she had got another servant in her place: held that this was a *dissolution* of the contract before the end of the year, by the notice to quit given and accepted; and not a mere *dispensation* of the service; and consequently no settlement was gained by such hiring and service. *The King* v. *The Inhabitants of Rushall, T.* 46 G. 3. 471

3. Five days before the end of the year a servant absented himself by leave one day from his master's service to look out for another place; and on his return the master on some trivial pretence said he should not stay any longer in his service, and offered him a trifle less than his whole wages, which the servant refused; but was then ready to have accepted his whole wages; though he would rather have staid out his year; and immediately he applied to a magistrate to oblige his master either to pay him the whole or to receive him into his service for the remainder of the year; when the magistrate ordered half a crown to be deducted; and the servant thereupon *hired himself to another master, before his first year was out*; and after the year received from his first master his whole wages. Held, that this was a *dissolution* of the contract before the end of the year by mutual consent, signified on the part of the servant by his entering into another service. *The King* v. *The Inhabitants of Leigh, T.* 46 G. 3. 539

SETTLEMENT—*By Marriage.*

An order of removal of *J. S.* and *B.* his wife, made *upon the examination of the wife*, adjudging that they lately came into the parish of *K.*, and are likely to become chargeable to it, and were last legally settled in *M.*, is good upon the face of it, and conclusive upon the parish of *M.* as to the marriage and settlement of the husband and wife; so that upon a subsequent removal of the wife, describing her as *B. S. single woman*, from *M.* to *B.*, *M.* cannot shew in evidence that the marriage was null and void. *The King* v. *The Inhabitants of Binegar, E.* 46 G. 3. 377

SETTLEMENT—*By Office.*

The appointment of a master of a workhouse by the parish officers and vestry pursuant to the stat. 9 G. 1. *c.* 7. which enables the parish officers and parishioners, &c. to *contract* with any person for the management of the poor in the workhouse, (and who did contract with the pauper to manage the poor in the workhouse, and teach the children to spin, &c. at a yearly salary; and after some years' service dismissed him at a quarter's notice,) is not a *public annual office or charge* within the statute of 3 *W.* & *M. c.* 11. *s.* 6. the executing of which for a year will confer a settlement. *The King* v. *The Inhabitants of Mersham, H.* 46 G. 3. 167

SEWERS.

By stat. 23 *H.* 8. *c.* 5. the jury by whom a presentment is made to commissioners of sewers concerning what lands are within a level and subject to a certain rate, ought to be summoned by the sheriff *from the body of the county*, in pursuance of a precept directed to him from

from the commissioners for that purpose. And a presentment made by a standing jury, constituted according to ancient usage, originally returned by the sheriff, at the commencement of every new commission of sewers, from certain parishes or districts, composed of land owners there, interested in disclaiming the general charges of the level, which jurymen acted for life, unless removed for cause, and only the *foreman* of whom was summoned by the sheriff on the particular occasion, which foreman thereupon convened the other jurymen; is illegal and void: and the want of jurisdiction of such presenting jury cannot be waved by traversing their presentment and going to trial before another jury properly returned from the body of the county, by whom such presentment was confirmed. The presenting jury, after being sworn and charged, must also prosecute their inquiry upon hearing evidence on oath before the commissioners *in curiâ*, and make their presentment thereon, and not upon information collected *in pais*, without oath. *The King* v. *The Commissioners of Sewers for the County of Somerset, M.* 46 G. 3. 71

SHERIFFS,

See BAIL-BOND.

SIMONY.

A chapel in the township of *P.* was endowed in 1428, by a deed executed by the then impropriator of the rectory, the then vicar, and the inhabitants of the township, and confirmed by the diocesan, whereby in consideration of a yearly payment to the vicar, it was provided that the curate of the chapel should receive all the tithes due to the vicar from the said inhabitants, and should be appointed by them: under which deed they continued to exercise the power of appointment and presentation. In 1797 an act passed for inclosing open lands in the township, in which it is stated as a matter of doubt, whether the curate were entitled to the small tithes or to a modus in lieu of tithes, the decision of which is left untouched by the act. In 1801, upon a vacancy, the inhabitants appoint and present a curate, upon an agreement signed by him and the principal inhabitants, wherein they state that he is appointed to the curacy, &c. and *to the money payment of* 40*l.* 8*s.* 2*d. annually payable out of the lands and hereditaments in* P. in right of the said curacy, together with surplus fees and *all other profits, privileges, and appurtenances to the same belonging and of right payable:* that the inhabitants considering that sum not sufficient for the proper support of the curate, had *voluntarily* agreed with him to pay a further annual sum of 29*l.* 11*s.* 10*d.* with a *proviso* that it "shall not in any respect alter the money payment of 40*l.* 8*s.* 2*d. wherewith the said lands are and have been* TIME IMMEMORIAL *charged in right of the said church.*" Held that this agreement, entered into for the purpose of restraining the then curate from asserting his claim to the small tithes by due course of law, and furnishing evidence against his successors, was *simoniacal*, and the presentation made thereon void. And the right of presentation having thereupon devolved upon the crown by stat. 31 *Eliz. c.* 6. *s.* 5., whose presentee had been licensed by the ordinary, a mandamus to the ordinary to license another curate subsequently appointed and presented by the inhabitants, who had given notice of having withdrawn their former nomination and presentment, and cancelled the agreement, was denied; and the rule was discharged with costs. *The King* v. *The Bishop of Oxford, T.* 46 G. 3. 600

STAMP.

The Sessions presumed that an indenture of apprenticeship executed 30 years before, and under which the apprentice had

had regularly served his time for seven years, when the indenture was given up to him, and proved to be lost, and where the parish in which he was settled under such indenture had relieved him the last 12 years, was *properly stamped* in proportion to the apprentice fee of 12*l.* received by the master; although the deputy registrar and comptroller of the stamp duties proved that it did not appear in that office that any such indenture had been stamped or inrolled during that period. And the judgment of the justices was confirmed in *B. R. The King* v. *The Inhabitants of Long Buckby, M.* 46 G. 3. 45

STATUTES.

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STOCK BROKER.

See BROKER, No. 2.

TENURE.

1. One may hold the prima tonsura of land as *copyhold*, and another may have the soil and every other beneficial enjoyment of it as *freehold*. And ancient admissions of the copyholder, and those under whom he claims the land, by the description of "tres acras prati," may be construed only to carry the prima tonsura, if in fact they have enjoyed no more under such admissions, while another has had the after-crop, and has cut the trees and fences, scoured the ditches, repaired the fences, and kept the drains; though the copyholder may have paid all the rates and taxes, which was in his own wrong. *Stammers* v. *Dixon*, *H.* 46 G. 3. 290
2. The *freehold* of an estate, parcel of a manor, and demiseable only by the licence of the lord, passing by surrender and admittance, to which the tenant was admitted by the description of a customary tenement, habendum to her and her heirs, tenendum of the lord by the rod, according to the custom of the manor, by the accustomed rent, suit of court, customs, and other services, is in the *lord* and not in the *tenant:* though not holden *ad voluntatem domini*. But such an estate, whether strictly copyhold or not to all purposes may well pass under the description of *copyhold* in a will; the intention to pass it under that description being apparent. *Doe d Cook and Wife* v. *Danvers*, *H.* 46 G. 3. 299
3. Where the tenants of a manor, formerly belonging to a monastery holding *by border service, and the defence of Tynemouth Castle,* under *copy of court roll,* and whose estates passed *by surrender and admittance,* shewed in evidence by surrenders as far back as they existed in writing; by admissions from the 17th *Eliz.* to the 14th *Car.* 1.; by Exchequer decrees between the lords and tenants in the times of *Eliz.* and *Jac.* 1.; and by an inquisition of the jury at the court-baron of the lord in the 2nd of *Jac.* 2.: that they were *copyholders of inheritance,* with *fines certain* holding *according to the custom of husbandry of the manor,* (*or according to the custom of the manor* generally,) without stating them to hold *at the will of the lord:* admitting this evidence to outweigh proof of minister's accounts in the 30th and 31st *Hen.* 1.; a grant of the manor from the crown in the 9th *Car.* 1. including these estates under the name of *tenements of husbandry;* subsequent mesne conveyances reserving the coal-mines, &c. in certain districts; and admissions from 1664 to 1777 (including admission of the several tenants to the estate immediately in question;) in all which they were stated to hold *at the will of the lord,* as well as *according to the custom of husbandry of the manor,* &c.: yet as there was evidence for more than a century past that the lord had leased the coal and lime-stone under the copyhold lands in different parts of the manor, and had received rent for the same; and that the lessees of the lord, and not the tenants, had taken the coals and lime-stone; held that such *acts of ownership* explained the nature of the tenure, *according to the custom of husbandry of the manor,* &c. and

and shewed, in aid of the other evidence, that the *freehold* was in the *lord*, and not in the *tenants*. And at any rate the evidence preponderating so much in favour of the lord, the Court would not disturb a verdict given for him. *Brown* v. *Rawlins*, *T.* 46 G. 3. 409

TIME, LENGTH OF.

See PRESUMPTION. REASONABLE TIME.

Under ancient deeds recognizing a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brush-wood, through which it is possible for the fish to escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape through the weir is debarred; though in flood times the fish may still overleap it. The enhancing, straitening, or enlarging of an ancient weir, as well as the new erection of one, for the purpose of stopping fish in their passage up a river, is treated as a public nuisance by *Magna Charta*, c. 23. and 12 *Ed.* 4. *c.* 7: and the right to convert a *brush-wood* into a *stone* weir, is not evidenced by shewing that 40 years ago two-thirds of it had been so converted, without interruption: the action for the injury having been brought within 20 years after the remaining third part was so converted. *Weld* v. *Hornby*, *Clerk*, *H.* 46 G. 3. 195

TROVER.

Where a broker pledges the goods of his principal as his own, the pawnee who claims by such tortious act of the broker cannot claim to retain against the principal, in trover, for the amount of the lien which the broker had on the goods for his general balance at the time of such pledge. It may be otherwise where one who has a lien delivers the goods to a third person as a security, with notice of his lien, and appoints him to continue in possession, as his servant, for the preservation of his lien. *M'Combie* v. *Davies*, *M.* 46 G. 3. 5

TRUST, DECLARATION OF,

See COPYHOLD, &c. No. 5.

TRUSTEE.

See BAIL-BOND, No. 1. COPYHOLD AND CUSTOMARY ESTATES, No. 1.

TRUSTEES OF INHERITANCE.

See DEVISE, No. 1.

USAGE.

One may hold the prima tonsura of land as copyhold, and another may have the soil and every other beneficial enjoyment of it as freehold: and ancient admissions of the copyholder and those under whom he claims the land, by the description of "tres acras prati," may be construed only to carry the prima tonsura, if in fact they have enjoyed no more under such admissions, while another has had the after-crop, and has cut the trees and fences, scoured the ditches, repaired the fences, and kept the drains; though the copyholder may have paid all the rates and taxes; which was in his own wrong. *Stammers* v. *Dixon*, *H.* 46 G. 3. 200

VENUE.

See EVIDENCE, No. 1. POOR-REMOVAL, No. 2.

The publisher of a public register receives an anonymous letter, tendering certain political information on *Irish* affairs, and requiring to know to whom his letters should be directed; to which an answer is returned in the register: after which he receives two letters in the same hand-writing, directed as mentioned, and having the *Irish* post-mark on the envelopes; which

which two letters were proved to be in the hand-writing of the defendant; the previous letter having been destroyed: This is a sufficient ground for the court to have the letters read: and the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the register *in Middlesex* for the purpose of publication, the whole is evidence sufficient for the jury to find a *publication* by the procurement of the defendant *in Middlesex*. *Rex* v. *The Hon. Robt. Johnson, M.* 46 G. 3. 65

WARRANTY.

After a warranty of a horse as sound the vendor in a subsequent conversation said, that *if the horse were unsound* (which he denied) *he would take it again and return the money*. This is no abandonment of the original contract, which still remains open; and though the horse be unsound the vendee must sue upon the warranty, and cannot maintain assumpsit for money had and received to recover back the price, after a tender of the horse. *Payne* v. *Whale, H.* 46 G. 3. 274

WEIR.

Under ancient deeds recognizing a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brush-wood, through which it is possible for the fish to escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape through the weir is debarred; though in flood times the fish may still overleap it. The enhancing, straitening, or enlarging of an ancient weir, as well as the new erection of one, for the purpose of stopping fish in their passage up a river, is treated as a public nuisance by *Magna Charta*, c. 23. and 12 *Ed.* 1. c. 7. And the right to convert a brushwood into a stone weir is not evidenced by shewing that 40 years ago two-thirds of it had been so converted, without interruption: the action for the injury having been brought within 20 years after the remaining third part was so converted. *Weld* v. *Hornby, Clerk, H.* 46 G. 3. 195

WILL.

1. A copyhold or customary estate, the freehold of which is in the lord and not in the tenant, and which passes by surrender and admittance, is not within the 5th section of the statute of frauds, 29 *Car.* 2. c. 3., so as to require to a devise of it the signature of the party, or the attestation of witnesses. Nor is it within the 7th section, as a declaration of trust, requiring to be proved by a writing *signed by the party*; which applies only to cases where the legal and equitable estates are separated; or by a will *in writing*; which must be understood only of such a will of lands as the statute recognizes, viz. a will attested by three or four witnesses. But held that it might well pass by instructions for a will taken in writing by another, in the presence and from the oral dictation of the party, though without any signature or attestation, which was established as her will by the ecclesiastical court granting probate thereof, and is a good *will* under the statute of wills; the estate having been surrendered to the use of her last will in writing. *Doe d. Cook and Wife* v. *Danvers, H.* 46 G. 3. 299
2. Such estates pass, not by the will alone, but by the will and surrender taken together. *ib.*

WITNESS.

1. A witness cannot be cross examined as to any collateral independent fact irrelevant to the matter in issue, for the purpose of contradicting him if his answer be one way by another witness, in order to discredit the whole of his testimony. *Spencelay q. t.* v. *De Willott, H.* 46 G. 3. 108

2. An

2. An attorney is bound to disclose, when called as a witness by the adverse party, the contents of a notice which he received to produce a paper in the hands of his client; the privilege of the client only extending to exclude the disclosure of any fact communicated confidentially to the witness in the character of his attorney. *Spenceley, qui tam,* v. *Schulenburgh, E.* 46 G. 3. 357

WORKHOUSE,

See SETTLEMENT BY OFFICE.

END OF THE SEVENTH VOLUME.

B. Bensley, Bolt Court, Fleet Street.

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